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Atchutappaiah N. V.
(CRIMINAL)

NEW YORK
1893
N. Y. Statutes
THE CODE
OF
CRIMINAL PROCEDURE

AND
PENAL CODE

OF THE
State of New York.

AS AMENDED,

AND IN FORCE AT THE CLOSE OF THE ONE HUNDRED AND
SIXTEENTH SESSION OF THE LEGISLATURE,

1893.

481)

ANNOTATED BY
JOHN T. COOK,
OF THE ALBANY BAR.

ALBANY, N. Y.:
H. B. PARSONS, LAW PUBLISHER.

1893.

Entered, according to act of Congress, in the year eighteen hundred and ninety-
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THE
CODE OF CRIMINAL PROCEDURE

OF THE
State of New York.

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THE CODE

OF

CRIMINAL PROCEDURE

OF THE

SECTIONS AMENDED OR ADDED.

1893.

CRIMINAL CODE.

Amended: Sections 56, 151, 155, 161, 164, 165, 308, 703, 704.

Added: Sections 470 a, 470 b.

PENAL CODE.

Amended: Sections 12, 41 c, 41 k, 41 r, 42, 160, 275, 355, 373, 376, 383, 413, 416, 468, 577 a, 587, 611, 651.

Added: Sections 41 x, 41 y, 48 a, 48 b, 48 c, 117 a, 154 a, 157 a, 290 a, 292 a, 292 b, 363 a, 384 a, 384 b, 405 a, 408 a, 415 a, 429 a, 433 a, 438 a, 438 b, 447 a, 485 a, 585 a, 640; subd. 13, 14, 640 a, 640 b, 640 c, 674 a, 717 a.

This Code is general in its nature, purports to apply to all criminal proceedings, and was passed for the purpose of blending into one intelligent and consistent act, all the various proceedings necessary, in administering the criminal law. *Fraser v. Board, etc.*, 17 State Rep. 875.

* See Laws 1892, ch. 677, § 29, *post*.

THE CODE
OF
CRIMINAL PROCEDURE
OF THE
STATE OF NEW YORK.

Laws 1881, Chapter 442.

AN ACT

TO ESTABLISH A CODE OF CRIMINAL PROCEDURE.

PASSED June 1, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

PRELIMINARY PROVISIONS.

- SECTION**
1. Title of the Code.
 2. Divisions of the Code.
 3. No person punishable but on legal conviction.
 4. Crimes, how prosecuted.
 5. Criminal action defined.
 6. Parties to a criminal action.
 7. The party prosecuted known as defendant.
 8. Rights of defendant in a criminal action.
 9. Second prosecution for the same crime prohibited.
 10. No person to be a witness against himself in a criminal action or to be unnecessarily restrained.

SECTION 1. Title of the Code. — This act shall be known as the Code of Criminal Procedure of the State of New York.

This Code is general in its nature, purports to apply to all criminal proceedings, and was passed for the purpose of blending into one intelligent and consistent act, all the various proceedings necessary, in administering the criminal law. *Fraser v. Board, etc.*, 17 State Rep. 875.

* See Laws 1892, ch. 677, § 29, *post*.

§ 2. Divisions of the Code.— This Code is divided into six parts. The first relates to the courts having original jurisdiction in criminal actions;

The second relates to the prevention of crime;

The third relates to the judicial proceedings for the removal of public officers by impeachment or otherwise;

The fourth relates to the proceedings in criminal actions prosecuted by indictment;

The fifth relates to proceedings in special sessions and police courts;

The sixth relates to special proceedings of a criminal nature.

This Code has jurisdiction of every indictment found after it went into effect regardless of when the crime was committed. *People v. Petrea*, 92 Y. 128; 65 How. Pr. 59; 1 N. Y. Cr. Rep. 233.

§ 3. No person punishable but on legal conviction.— No person can be punished for a crime except upon legal conviction in a court having jurisdiction thereof.

See State Const., art. 1, § 1; Fed. Const., fifth amendment; Penal Code, § 9 and note; *Cameron v. Tribune Ass'n*, 27 State Rep. 912; 55 Hun, 607. In *People, ex rel. McDonald, v. Keeler*, 32 Hun, 594, the court say: "It is the very basis of liberty, that no person shall be imprisoned unless the right to imprison him has been or may be determined by the judiciary. *People v. Brady*, 56 N. Y. 182; *Taylor v. Porter*, 4 Hill, 140; Const., art. 1, § 1. It must be for the courts to decide whether he is deprived of his rights 'by the law of the land.' Otherwise the legislature might pass a law to imprison a man with or without cause and he would be remediless."

§ 4. Crimes, how prosecuted.— A crime must be prosecuted by indictment, except:

1. Where proceedings are had for the removal of a civil officer of the state on impeachment by the assembly for willful or corrupt misconduct in office;

2. Where proceedings are had for the removal of justices of the peace, police justices and justices of justices' courts and their clerks;

3. A crime arising in the militia when in actual service, and in the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace;

4. Such crimes as are hereinafter or in special statutes specified as cognizable by courts of special sessions and police courts.

State Const., art. 1, § 6; Fed. Const., fifth amendment.

§ 5. Criminal action defined. — The proceeding, by which a party charged with a crime is accused and brought to trial and punishment, is known as a criminal action.

§ 6. Parties to a criminal action. — A criminal action is prosecuted in the name of the people of the State of New York, as plaintiffs, against the party charged with crime.

See *People v. Johnson*, 104 N. Y. 216; 5 N. Y. Cr. Rep. 219.

§ 7. The party prosecuted known as defendant. — The party prosecuted in a criminal action is designated in this Code as the defendant.

See *People v. Johnson*, 104 N. Y. 216; 5 N. Y. Cr. Rep. 219.

§ 8. Rights of defendant in a criminal action. — In a criminal action the defendant is entitled:

1. To a speedy and public trial;
2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel; and,
3. To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, or where the testimony of a witness on the part of the people, has been taken according to the provisions of section two hundred and nineteen of this Code, the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found in the state.

Subdiv. 1. See 5 L. R. A. 832, note; Rapalje's *Crim. Proc.*, § 152; Desty's *Penal Code, Cal.*, § 686; 4 *Crim. L. Mag.* 801; Cooley's *Const. Lim.* (5th ed.) 379, 380; 4 *Amer. & Eng. Ency. of Law*, 812; *United States v. Fox*, 3 Mont. 512; *People v. Murray* (Mich.), 50 N. W. Rep'r, 995; N. Y. L. J. Oct. 31, 1892; 26 *Am. L. Rev.* 771.

The exclusion of jurors summoned for the term, but not impaneled, is not a deprivation of the right of public trial. *People v. Sprague*, 54 Cal. 491.

Subdiv. 2. See Cooley's *Const. Lim.* (5th ed.) 405; 21 *Am. L. Reg.* (N. S.) 623.

A prisoner is entitled to a private consultation with counsel after having been committed to await action of grand jury. *People, ex rel. Burgess, v. Easley*, 66 How. Pr. 67.

He is also entitled to be present with counsel when the jury view the premises where a crime is alleged to have been committed, pursuant to section 411, *post*. *People v. Palmer*, 43 Hun, 401, 407; 2 N. Y. Cr. Rep. 106.

In trials by court martial the accused is entitled to counsel. *People, ex rel. Garling, v. Van Allen*, 55 N. Y. 31; *People v. Sharp*, 45 Hun, 492; *People v. Mayor, etc.*, 19 id. 452.

Subdiv. 3. See Rapalje's Crim. Proc., § 279.

It is sufficient, if the accused be once confronted by the witnesses against him at any stage of the proceeding upon the same accusation and have an opportunity of cross-examination. *People v. Penhollow*, 5 N. Y. Cr. Rep. 41; 42 Hun, 108.

The provision that the deposition of a witness, taken before the magistrate in the presence of the defendant, who at the time had an opportunity of cross-examining the witness, may, under certain circumstances, be read in evidence upon the trial, is not unconstitutional. *People v. Williams*, 35 Hun, 516; 3 N. Y. Cr. Rep. 63; *People v. Fish*, 125 N. Y. 152.

To same effect, *Territory v. Evans*, 12 Crim. L. Mag. 446; *State v. McO'Brien*, 24 Mo. 412; *Summons v. State*, 5 Ohio St. 340; *Gilbreath v. State*, 26 Tex. App. 318; *People v. Brotherton*, 47 Cal. 388; *People v. Leong Sing*, 77 id. 117.

"Due diligence." See *People v. Murphy*, 1 N. Y. Cr. Rep. 102.

§ 9. Second prosecution for the same crime prohibited.—

No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted.

State Const., art. 1, § 6; Fed. Const., fifth amendment; Penal Code, § 86; Cooley Const. Lim. (5th ed.) 400; 1 Bish. Crim. Law (7th ed.), §§ 978-1070; 17 Am. Law Rev. (N. S.) 735; 33 Am. Dec. 96, note; 11 Am. & Eng. Encyc. of Law, 926; 6 Crim. Law Mag. 61; 4 id. 27, 487; 18 Cent. L. J. 43, 63; Rapalje Crim. Proc., § 124.

The rules and authorities as to the effect of a former acquittal or former conviction will be found collected in Abbott's Crim. Brief, 64, etc., 443, etc.

The incorporation into the federal constitution and into constitutions of states of the phrase "twice put in jeopardy for the same offense," was but the recognition and the application in a stronger form of expression of the common-law doctrine. *People v. Palmer*, 109 N. Y. 417. See, also, *Canter v. People*, 5 Abb. Pr. (N. S.) 27.

"In a legal sense * * * a prisoner is not once put in jeopardy until the verdict of the jury is rendered for or against him." Spencer, J., in *People v. Goodwin*, 18 Johns. 187. See *People v. Green*, 13 Wend. 55.

A prisoner is not put in jeopardy where the evidence fails to establish the offense charged. *Canter v. People*, 1 Abb. Dec. 305.

In this state a prisoner is considered in jeopardy when he has been arraigned and pleaded to a valid indictment, a witness has been sworn and evidence given, and then, without his consent, a juror has been withdrawn or the jury discharged. *King v. People*, 5 Hun, 297; *Hilands v. Com.* (Penn.), 33 Alb. L. J. 147.

The pendency of a prior indictment, to which he has pleaded, cannot be pleaded in abatement. *People v. Fisher*, 14 Wend. 9.

The plea of *autrefois convict* is supported by proof of a lawful trial and verdict, though no judgment be given upon it. *Shepherd v. People*, 25 N. Y. 406; reversing 23 How. 337; *People v. Cramer*, 5 Park. 171. See, also, *People v. Barrett*, 1 Johns. 66.

A verdict upon which no judgment could have been given cannot be pleaded as a former acquittal. *People v. Olcott*, 2 Johns. Cas. 301.

Former acquittal not a bar, the act being the same where the intent was different. *People v. Warren*, 1 Park. 338.

When one offense is committed the more effectually to carry into effect another, an acquittal of the latter is no bar to an indictment for the former. *People v. Ward*, 15 Wend. 231.

A former trial and acquittal is no bar unless the offenses charged in both indictments are the same in law as well as in fact. 4 Bl. Com. 336; 1 Russ. Crimes, 829, 836; *People v. Burch*, 5 N. Y. Cr. Rep. 29; *Com. v. Roby*, 12 Pick. 496; *Burns v. People*, 1 Park. 182; *People v. Nichols*, 3 id. 579; *People v. Richards*, 44 Hun, 288; *People v. Saunders*, 4 Park. 106.

Where, by the same act, defendant murders two persons, conviction or acquittal of the murder of one is no bar to a prosecution for the murder of the other. *People v. Majors*, 65 Cal. 138; 52 Am. Rep. 295.

A verdict of acquittal, upon the trial of an indictment, for robbery is no bar to a subsequent indictment and conviction for perjury, committed by defendant as a witness on his own behalf, on trial of the former indictment, though the testimony on the two trials be substantially the same. *People v. Scully*, 3 N. Y. Cr. Rep. 244.

A trial and acquittal of robbery may be pleaded in bar to an indictment for larceny of the same property. *People v. McGowan*, 17 Wend. 386; *People v. Smith*, 57 Barb. 46.

An acquittal upon an indictment for larceny, no bar to an indictment for embezzlement of same property. *People v. Burch*, 5 N. Y. Cr. Rep. 29; 1 N. Y. State Rep. 751.

A verdict of acquittal for stealing the same goods, which were charged in the former indictment as the property of another owner, cannot be pleaded in bar. *Hughes' Case*, 4 C. H. Rec. 132.

Single act constituting two separate offenses, when conviction for one offense does not bar prosecution for the other. *People, ex rel., etc., v. Sadler*, 3 N. Y. Cr. Rep. 471; *People v. Miller*, id. 475. See, also, 26 Alb. L. J. 324; 15 Cox Crim. Cas. 85; 36 Eng. Rep. 500; 16 Am. St. Rep. 224; 14 id. 572.

Conviction for assault and battery no bar to indictment for murder, where the person assaulted subsequently dies of the blows. *Burns v. People*, 1 Park. 182.

A conviction for uttering a forged bond is a bar to a subsequent conviction, under an indictment charging the uttering, at the same time, of the mortgage accompanying such bond, and purporting to secure the performance of its conditions. *People v. Peck*, 4 N. Y. Cr. Rep. 148.

Former acquittal on an indictment charging an indorsement, may be pleaded in bar to another charging forgery of the same note and indorsement. *People v. Allen*, 1 Park. 445.

So, also, an acquittal on an indictment charging the prisoner with having in his possession a certain counterfeit note with intent to utter it, may be pleaded

in bar to a subsequent indictment for having such other notes in his possession for a like intent, where all were in possession at the same time. *People v. Van Keuren*, 5 Park. 66.

An acquittal on the merits of the offense of forging an order in writing is pleadable in bar to a subsequent prosecution for obtaining money on the false pretense that the instrument was true. *People v. Krummer*, 4 Park. 217; 1 Seld. 549.

To an indictment for rape the defendant cannot plead in bar a former conviction for assault and battery arising out of the same transaction. *People v. Saunders*, 4 Park. 196.

An acquittal on a former indictment for nuisance is not a bar to a second prosecution, where the erection is not a nuisance *per se*. *People v. Townsend*, 3 Hill, 479.

Where a prisoner has been put on trial, a juror cannot be withdrawn without his consent. *People v. Barrett*, 2 Cai. 304; *Grant v. People*, 4 Park. 527; *Klock v. People*, 2 id. 676.

In case of disagreement the jury may be discharged and the prisoner retried. *People v. Goodwin*, 18 Johns. 187; *Jones v. Com.*, 14 Va. L. J. 197; 10 S. E. Rep. 1004.

So where they separate without authority and are afterward discharged. *People v. Reagle*, 60 Barb. 527.

In cases of misdemeanor the court of sessions may discharge the jury without consent of the prisoner, and he may be tried again. 2 Johns. Cas. 275.

An arrest of judgment after conviction for felony is not a bar to a second indictment. *People v. Casborus*, 13 Johns. 351.

Acquittal ~~A conviction~~ fraudulently obtained by defendant is not a bar to a subsequent prosecution for the same offense. *McFarland v. State*, 68 Wis. 400; 60 Am. Rep. 867; *State v. Simpson*, 28 Minn. 66; 41 Am. Rep. 269.

A person may be tried on a second indictment after a *nolle pros.* or *superseas* of the first, to which the plea of jurisdiction only had been overruled. *Gardiner v. People*, 6 Park. 155, 190.

A prisoner sentenced upon a regular trial and conviction cannot be retried, *Shepherd v. People*, 25 N. Y. 406; but the judgment may be corrected under the act of 1863. *Hussy v. People*, 47 Barb. 503.

Where one is convicted of murder and the law is subsequently repealed without reservation and a new law enacted, he cannot be tried again, nor can he be executed under a re-enactment of the old law. *Hartung v. People*, 26 N. Y. 167.

The defense of former acquittal must be pleaded, and in the absence of a plea setting it up, the question cannot be raised. Code Crim. Proc., §§ 332, 339; *People v. Cignarale*, 110 N. Y. 29; *People v. Benjamin*, 2 Park. 201. See, also, 4 L. R. A. 542, note; *Rapalje Crim. Proc.*, § 140.

To sustain the plea of former acquittal it must appear that the party was "put in jeopardy" by the former trial. *Canter v. People*, 5 Abb. Pr. (N. S.) 27; 1 Abb. Dec. 305; *People v. Warren*, 1 Park. 338.

Where an indictment contains three counts, and the jury find a verdict of guilty on the first count, and omit to find either way as to the remaining counts, it is equivalent to an acquittal on those counts, and is as to them a bar

to further prosecution. *People v. Seeley*, 3 N. Y. Cr. Rep. 225; *People v. Dowling*, 84 N. Y. 478; *Guenther v. People*, 24 id. 100.

To same effect, Whart. Crim. Pl. & Pr., § 740; *Bell v. State*, 48 Ala. 684; 17 Am. Rep. 40; *Edgerton v. Com.*, 5 Allen, 514; *Stuart v. Com.*, 28 Gratt. 950.

Where a party seeks and obtains a new trial for error, he thereby waives his constitutional protection and can be again tried for the offense of which he was formerly convicted. *People v. Cignarale*, 110 N. Y. 30, 31; *People v. Kefer*, 65 Cal. 232; *Bohanan v. State*, 18 Neb. 57; 53 Am. Rep. 791; *Shular v. State*, 105 Ind. 289; 55 Am. Rep. 217.

In *People v. Palmer*, 109 N. Y. 419, the court say: "The effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court, and if reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, have been annulled and expunged by the judgment of the appellate court, and they are as though they never had been; while the indictment is left to stand as to the crime of which the prisoner had been charged and convicted as though there had been no trial. Only where the result of the former trial was in effect an acquittal of another crime charged in the indictment, may he plead that result in bar of further prosecution for that crime. If the defendant takes an appeal from the judgment of conviction, he must be deemed to ask for a correction of errors made upon his trial, and to waive his constitutional protection. Of necessity he must be deemed to ask for a new trial. By taking the appeal to the supreme court power is conferred upon that court to continue and review the prisoner's trial, and upon a reversal to pronounce such judgment as it deems just within the terms of the statute. It may affirm the proceedings below, or reverse, and either order a new trial or discharge the prisoner. That no constitutional right of the party is invaded must be a self-evident proposition, or it is a privilege which is granted, of which he may, but not must, avail himself. I think that the sounder doctrine which recognizes a distinction between jeopardy incurred with the consent of the prisoner and jeopardy incurred without that consent."

A statute which provides that "the granting of a new trial places the parties in the same position as if no trial had been had," is not unconstitutional. *Com. v. Arnold*, 83 Ky. 1; 4 Am. St. Rep. 114. In that case it was held that the granting of a new trial to one convicted of manslaughter upon an indictment for murder, was not a bar to another trial under the same indictment, for the higher offense. See exhaustive note to this case, collating the authorities.

A statute providing that a person shall be subjected to an increased punishment upon conviction for a second offense is not in violation of a constitutional provision that no person shall be twice put in jeopardy for the same offense. *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401; *Chenoweth v. Com.* (Ky.), 13 Crim. Law Mag. 234.

§10. **No person to be a witness against himself in a criminal action or to be unnecessarily restrained.** — No person can be compelled in a criminal action to be a witness against himself, nor can a person charged with crime be subjected, before

conviction, to any more restraint than is necessary for his detention to answer the charge.

See State Const., art. 1, § 6; Fed. Const., fifth amendment; 19 Eng. Rep. 617; *People v. McCoy*, 45 How. Pr. 216; *People v. Mondon*, 103 N. Y. 220; 38 Hun, 198; 4 N. Y. Cr. Rep. 123; *People v. Guidici*, 100 N. Y. 508; *Connors v. People*, 50 id. 240; *Ruloff v. People*, 45 id. 221; *People v. Courtney*, 94 id. 490; *People v. King*, 64 Cal. 338; *Boyd v. U. S.*, 116 U. S. 616; *People v. Hackley*, 24 N. Y. 74. *U. S. v. Denicke*, 10 Cr. L. Mag. 868.

As to compelling a prisoner to furnish evidence of his identity by putting his foot in a track or exposing his person, see *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493; *Walker v. State*, 7 Tex. Ct. App. 245; 32 Am. Rep. 595; *Stokes v. State*, 5 Baxt. 619; 32 Am. Rep. 595; *State v. Sanders*, 68 Mo. 202; 30 Am. Rep. 782; *State v. Garrett*, 71 N. C. 85; 17 Am. Rep. 1; *State v. Ah Chuey*, 14 Nev. 79; 33 Am. Rep. 530; *Blackwell v. State*, 67 Ga. 76; 44 Am. Rep. 717; *Campbell v. State*, 55 Ala. 80; *Cooper v. State* (Ala.), 4 L. R. A. 766.

A prisoner is entitled to appear for trial free from all manner of shackles or bonds, unless there is danger of his escape. *People v. Harrington*, 42 Cal. 165; 10 Am. Rep. 296.

Defendant may be a witness in his own behalf. § 393, *post*.

The object of the constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself" was not to prevent the passing of laws allowing the accused to testify in his own behalf if he choose to avail himself of that privilege, but to prevent the enactment of statutes by which the accused might be subjected to actual compulsion to give evidence. *People v. Courtney*, 1 N. Y. Cr. Rep. 558.

Where a defendant when arrested is compelled to subject his body to inspection in order to discover his identity, the person making such inspection may testify on the trial as to the marks found by him on defendant's body, since the giving of such testimony is not compelling defendant to testify against himself. *O'Brien v. State*, 13 Cr. L. Mag. 84; 25 Am. L. Rev. 141; 33 Alb. L. J. 448.

In *Chartang v. State* (Ala.) 10 Cr. L. Mag. 417, defendant being arrested was found to have a pistol concealed in his hip pocket. On the trial on an indictment for carrying concealed weapons, defendant objected that the search of his person was a trespass, and the testimony thus obtained was improper, held that the objection was properly overruled.

In *McGriff v. State*, 88 Ala. 147; 16 Am. St. Rep. 825, it was held that on a prosecution for rape of an infant under ten years of age, the prosecutrix cannot be compelled as matter of right to submit to a personal medical examination. If such right exists, it is a matter of discretion with the trial court to be exercised only in cases of extreme necessity and not subject to review on appeal.

A witness before a grand jury in the Federal courts may refuse to answer on the ground that his testimony will tend to criminate himself. *Counselman v. Hitchcock*, 142 U. S. 547; 45 Alb. L. J. 231, reversing 44 Fed. Rep. 268.

PART I.

OF THE COURTS HAVING ORIGINAL JURISDICTION IN CRIMINAL ACTIONS.

TITLE I. OF THE COURTS OF ORIGINAL CRIMINAL JURISDICTION IN GENERAL.

- II. OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.**
- III. OF THE COURTS OF OYER AND TERMINER.**
- IV. OF THE CITY COURTS.**
- V. OF THE COURTS OF SESSIONS.**
- VI. OF THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS.**

TITLE I.

OF THE COURTS OF ORIGINAL CRIMINAL JURISDICTION IN GENERAL.

SECTION 11. Of the courts of original criminal jurisdiction.

§ 11. Of the courts of original criminal jurisdiction. —
The following are the courts of justice in this state having original jurisdiction of criminal actions :

1. The court for the trial of impeachments ;
2. The courts of oyer and terminer ;
3. The city courts of Brooklyn, Buffalo, Utica, Oswego and Hudson ;
4. The courts of sessions, in counties other than New York ;
5. The court of general sessions in the city and county of New York ;
6. The courts of special sessions ;
7. The police courts.

The courts of special sessions and police courts are deemed inferior courts not of record, within the section of the Constitution which provides for the removal of justices of the peace and judges, or justices of inferior courts not of record, and their clerks, by such county, city or state courts as are designated by law ; but for no other purpose.

See State Const., art. 6, §§ 18, 19.

TITLE II.

OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.

SECTION 12. Its jurisdiction.

13. Members of the court.

14. Presiding judge.

15. Clerks and officers.

16. Seal of the court.

17. Time of holding the court.

18. Oath to members of the court.

19. Adjournments, etc.

20. Compensation of members and officers of the court.

§ 12. Its jurisdiction. — The court for the trial of impeachments has power to try impeachments, when presented by the assembly, of all civil officers of the state, except justices of the peace, justices of justices' courts, police justices, and their clerks, for willful and corrupt misconduct in office.

See State Const., art. 6, §§ 1, 18.

§ 13. Members of the court. — The court is composed of the president of the senate, the senators, or a majority of them, and the judges of the court of appeals, or a majority of them, but on the trial of an impeachment against the governor, the lieutenant governor cannot act as a member of the court.

See State Const., art. 6, § 1.

§ 14. Presiding judge. — The president of the senate, or in case of his impeachment, death or absence, the chief judge of the court of appeals, or in the absence of both, such other member as the court may elect, is the presiding judge of the court.

§ 15. Clerks and officers. — The clerk and officers of the senate are the clerk and officers of the court for the trial of impeachments.

§ 16. Seal of the court. — The seal of the court for the trial of impeachments now deposited and recorded in the office of the secretary of state shall continue to be the seal of this court and must be kept in the custody of the clerk of the senate.

§ 17. **Time of holding the court.**— Upon the delivery of an impeachment from the assembly to the senate the president of the senate must cause the court to be summoned to meet at the capitol in the city of Albany, on a day not less than thirty nor more than sixty days from the day of the delivery of the articles of impeachment.

§ 18. **Oath to members of the court.**— At the time and place appointed, and before the court proceeds to act upon the impeachment, the clerk must administer to the presiding judge, and the presiding judge to each of the members of the court then present, an oath or affirmation truly and impartially to try and determine the impeachment; and no member of the court can act or vote upon the impeachment, or any question arising thereon, without having taken this oath or affirmation.

§ 19. **Adjournments, etc.**— The court may adjourn from time to time and hold its sessions at such places as it may determine, but no more than two sessions of the court can be held during the recess of the legislature in any one year.

§ 20. **Compensation of members and officers of the court.** The writ and process of the court must be signed by the clerk and tested in the name of the president of the senate. The president of the senate and each senator are entitled to receive for their services and expenses while actually attending the court the same rate of compensation as an associate judge of the court of appeals is entitled by law to receive for his services and expenses as such judge for the same time. The other officers of the court, excepting the judges of the court of appeals, are entitled to the same compensation for their attendance thereon, and for traveling to and from the place where it is held, as is allowed them for attending a meeting of the senate, but no such compensation shall be received for attending the court during a session of the legislature.

TITLE III.

OF THE COURTS OF OYER AND TERMINER.

SECTION 21. Court of oyer and terminer in each county.

22. Its jurisdiction.

23. By whom held.

24. Writ or process.

25. Clerk.

§ 21. Court of oyer and terminer in each county. —

There is in each of the counties of this state, except that for this purpose Fulton and Hamilton are deemed one county, a court of oyer and terminer, with the jurisdiction conferred by the next section and no other, but nothing contained in this section affects its jurisdiction in actions or proceedings now pending therein.

The oyer and terminer is a permanent and continuous court. Its successive sessions are terms of the same, and not distinct tribunals. *Quimbo Appo v. People*, 20 N. Y. 531; 18 How. Pr. 350.

Though held by different presiding justices. *People v. Naughton*, 7 Abb. Pr. (N. S.) 421.

§ 22. Its jurisdiction. — The court of oyer and terminer has jurisdiction:

1. To inquire, by the intervention of a grand jury, of all crimes committed or triable in the county; but in respect of such minor crimes as courts of special sessions or police courts have exclusive jurisdiction to hear and determine, in the first instance, the jurisdiction of the oyer and terminer attaches only after the certificate mentioned in section fifty-seven of this Code;

2. To try and determine all such crimes. and to try all persons indicted for the same;

3. To deliver the jails of the county, or city and county, according to law, of all prisoners therein;

4. To try any indictment found in the court of sessions of the county or the court of general sessions of the city and county of New York, which has been sent by order of the court of sessions or general sessions to and received by the court of oyer and terminer, or which has been removed from any court into the court of oyer and terminer if, in the opinion of that court, it is proper to be tried therein;

5. To exercise the same jurisdiction as a court of sessions in a

cause or proceeding transferred according to sections forty and forty-one of this Code ;

6. By an order, entered in its minutes, to send any indictment found therein for a crime triable at the court of sessions of the county, or the court of general sessions of the city and county of New York, to such court ;

7. To grant new trials in all cases tried therein ;

8. To let to bail any person committed, before and after indictment found, upon any criminal charge whatever ;

9. To exercise the powers conferred upon it by other provisions of this Code and by special statutes.

The organization of courts of oyer and terminer, with the exception that a justice of the supreme court must preside, is within the control of the legislature. *People v. Bork*, 96 N. Y. 198.

These courts are of superior criminal jurisdiction, and every thing necessary to confer jurisdiction over defendant's person is presumed. *People v. Cavanaugh*, 2 Abb. Pr. 84; reversing 1 Park. 588; 2 id. 650.

May try an indictment found in the sessions, without an order of the sessions, sending it there for trial. *People, ex rel. Sherwin, v. Mead*, 23 Hun, 227; 64 How. 41; 92 N. Y. 415; *People v. Myers*, 2 Hun, 626; *People v. Gay*, 10 Wend. 509; *People v. Quimbo Appo*, 20 N. Y. 577; *People v. Sessions*, 3 Barb. 144.

An indictment for murder found in general sessions may be transferred to oyer and terminer for trial. *Thompson v. People*, 6 Hun, 135; *Dolan v. People*, id. 493; 64 N. Y. 485.

An indictment found in the oyer and terminer and remitted to the sessions, may be again remitted back to the former court for trial. *People v. Gay*, 10 Wend. 509.

An indictment sent to the oyer and terminer by the general sessions, may be tried at any time thereafter, though ordered to be sent to the next court of oyer and terminer. *Neal v. People*, 42 N. Y. 270; 55 Barb. 551; 8 Abb. (N. S.) 314.

A court of oyer and terminer had no power, by the common law, to grant new trials upon the merits, after conviction, in a capital case, nor it seems, in any case of felony. 6 T. R. 625; Chit. Crim. Law, 582; *Appo v. People*, 20 N. Y. 581; *People v. Townsend*, 1 Johns. Cas. 104; Col. & Cr. Cas. 73; *Noah's Case*, 3 C. H. Rec. 13; *People v. Comstock*, 8 Wend. 549; *People v. Dutchess* (O. and T.), 2 Barb. 282. See, also, *Willis v. People*, 32 N. Y. 715; 5 Park. 621; *People v. Morrison*, 1 id. 625.

The judge has no power to adjourn the oyer and terminer to another place within the district, than that appointed for holding the court. *Northrup v. People*, 37 N. Y. 203. reversing 50 Barb. 147.

The supreme court judge assigned to hold the oyer and terminer cannot adjourn the court to a future day by a written order to the sheriff without being present in court; but such adjournment may be ordered by any judge present. *People v. Clews*, 4 Abb. N. C. 256.

The oyer and terminer has jurisdiction of a murder committed by a soldier in the actual service of the general government, within the body of the county; that a court-martial has concurrent jurisdiction makes no difference. *People v. Gardiner*, 6 Park. 143.

§ 23. By whom held. — A court of oyer and terminer is held by a justice of the supreme court, without an associate.

This section is not affected by the provisions of section 962, *post*.

Since the adoption of the constitution of 1846, the organization of courts of oyer and terminer is within the control of the legislature with the single exception that a justice of the supreme court must be a member of the court and must preside. *Smith v. People*, 47 N. Y. 330.

The fact that two justices of sessions sat with supreme court justice is a mere irregularity, and does not affect the court's jurisdiction. *People, ex rel. Bork, v. Gilbert*, 1 N. Y. Cr. Rep. 398.

Court of oyer and terminer organized under this section may execute a sentence, pronounced by a court of oyer and terminer before this section took effect. *Ostrander v. People*, 29 Hun, 513; 1 N. Y. Cr. Rep. 274; *People v. Bork*, 96 N. Y. 198; 2 N. Y. Cr. Rep. 177.

§ 24. Writ or process. — A writ or process issued out of the court of oyer and terminer must be tested in the name of a justice of the supreme court of the district, and may be directed by the court into any county of the state, as occasion requires.

§ 25. Clerk. — Except the clerk of the county of New York, the clerk of each county is, by virtue of his office, the clerk of the court of oyer and terminer held therein.

TITLE IV.

OF THE CITY COURTS.

- CHAPTER I.** The city court of Brooklyn.
 II. The superior court of Buffalo
 III. The other city courts.
 IV. General provisions relating to city courts.

CHAPTER I

THE CITY COURT OF BROOKLYN.

SECTION 26. Jurisdiction.

27. By whom held.

§ 26. Jurisdiction. — The city court of Brooklyn has criminal jurisdiction :

1. To the same extent and in the same manner, and with the same power as a court of oyer and terminer in the county of Kings in the indictment and trial of all offenses committed in the city of Brooklyn, whenever a bill of indictment for any such offense has been transmitted to the court by the court of sessions or court of oyer and terminer of the county of Kings ;

2. To remand any such indictment to the court of sessions or court of oyer and terminer of the county of Kings ;

3. To prosecute a forfeited recognizance taken by the court of sessions or court of oyer and terminer of Kings county, and binding the party or parties and witnesses to such indictment to appear in the city of Brooklyn.

Laws 1849, chap. 125, § 1; Laws 1870, chap. 470; and see N. Y. Const., art. VI, § 12; 3 R. S. 282, § 15; Code Civ. Proc., §§ 807-813.

§ 27. By whom held. — Any one of the judges of the city court of Brooklyn may hold a court of criminal jurisdiction.

CHAPTER II.

THE SUPERIOR COURT OF BUFFALO.

SECTION 28. Jurisdiction.

29. By whom held.

30. Terms.

§ 28. Jurisdiction. — The superior court of Buffalo has criminal jurisdiction :

1. To inquire by a grand jury of all crimes committed in the city of Buffalo ;

2. To try and determine all indictments found therein, or sent thereto by another court for a crime committed in that city ;

3. To send any indictment pending therein undetermined to the court of oyer and terminer or to the court of sessions of the county of Erie, to be determined according to law ;

4. At a general term thereof exclusively to review upon motion on the indictment, with or without a bill of exceptions, its decisions and judgments, and grant new trials.

See *People v. Demick*, 107 N. Y. 15; 41 Hun, 633; 5 N. Y. Cr.-Rep. 200.

§ 29. **By whom held.**— The court for the trial of indictments and the transaction of criminal business other than specified in subdivision 4 of the last section, may be held by any one of the justices thereof.

See Code Civ. Proc., §§ 295-296.

§ 30. **Terms.**— There must be at least four terms of the court for the trial of indictments and the transaction of criminal business held in each year, to be appointed as prescribed in section 280 of the Code of Civil Procedure.

See Code Civ. Proc., §§ 295-296.

CHAPTER III.

THE OTHER CITY COURTS.

SECTION 31. Other city courts.

32. By whom held.

§ 31. **Other city courts.**— The other city courts, having original criminal jurisdiction, are the recorder's court of Utica, the recorder's court of Oswego, and the mayor's court of Hudson. Their jurisdiction in criminal matters is defined by special statutes, and continues as thus defined.

§ 32. **By whom held.**— These courts for the exercise of their criminal jurisdiction must be held by the following officers :

1. The city courts of Utica and Oswego by the recorders of those cities respectively ;
2. The mayor's court of Hudson, by the mayor of that city.

CHAPTER IV.

GENERAL PROVISIONS RELATING TO CITY COURTS.

SECTION 33. Indictments for offenses punishable with death to be sent to oyer and terminer.

34. Indictments for crime not punishable by death.

35. Same.

36. Court continued beyond terms.

§ 33. **Indictments for offenses punishable with death to be sent to oyer and terminer.** — When an indictment is found at a city court for a crime punishable with death, the court may send it to the next court of oyer and terminer of the county.

§ 34. **Indictments for crime not punishable by death.** — A city court may also send an indictment found therein and remaining undetermined for a crime not punishable with death to the next court of oyer and terminer of the same county, to be determined according to law. But that court, if, in its opinion, the same is not proper to be tried therein, may remit it back to the court by which it was sent, which must proceed thereon as if it had remained there.

§ 35. **Same.** — When an indictment is found at a court of oyer and terminer, or of sessions, in a county embracing any of the cities in which a city court having original criminal jurisdiction is established, for an offense committed in that city, the court in which it was found may send it to the next city court in which it is triable, which must proceed to try and determine the indictment as if it had been found therein.

§ 36. **Court continued beyond terms.** — If the trial of a cause be commenced before the expiration of the term of a city court the court may be continued beyond the term, to the completion of the trial and the rendering of judgment on the verdict

TITLE V.

OF THE COURTS OF SESSIONS.

- CHAPTER I.** The courts of sessions in general.
II. The courts of sessions in counties other than New York.
III. The court of general sessions of the city and county of New York.

CHAPTER I.

THE COURTS OF SESSIONS IN GENERAL.

- SECTION 37.** General provisions.
38. The courts of sessions.

§ 37. **General provisions.** — There is in each of the counties of this state a court denominated the court of sessions, with the jurisdiction conferred by the next two chapters and no other, but nothing contained in this section affects its jurisdiction in actions or proceedings now pending therein.

§ 38. **The courts of sessions.**— The courts of sessions are

1. The courts of sessions in counties other than New York ;
2. The court of general sessions in the city and county of New York.

CHAPTER II.

COURTS OF SESSIONS IN COUNTIES OTHER THAN NEW YORK AND KINGS.

SECTION 39. Jurisdiction.

40. Indictments to be sent to oyer and terminer.
41. Other indictments may be sent to oyer and terminer.
42. By whom held.
43. Justice disqualified.
44. Same.
45. When and where held; jurors.
46. Jurors, how drawn.
47. Clerk.
48. Writ or process.
49. Compensation of justice.

§ 39. **Jurisdiction.**—The courts of sessions embraced in this chapter have jurisdiction :

1. To inquire by the intervention of a grand jury of all crimes committed or triable in the county ; but in respect of such minor crimes as courts of special sessions or police courts have exclusive jurisdiction to hear and determine, in the first instance, the jurisdiction of the sessions attaches only after the certificate mentioned in section 57 of this Code ;

2. To try and determine indictments found therein or sent thereto by the court of oyer and terminer of the county, or by a city court in the county, for crimes not punishable with death ;

3. To hear and determine appeals from orders of justices of the peace under the provisions of law respecting the support of bastards ;

4. To examine into the circumstances of persons committed to prison as parents of bastards, and to discharge them in the cases provided by law;

5. To try and determine complaints under the provisions of law respecting masters, apprentices and servants;

6. To review the convictions of disorderly persons actually imprisoned, and to execute the powers conferred and duties imposed by law in relation to those persons;

7. To continue or discharge recognizances, undertakings and bonds of persons bound to keep the peace or to be of good behavior and to inquire into and determine the complaints on which they were founded;

8. To compel relatives of poor persons and committees of the estates of lunatics to support such persons and lunatics in the cases and manner prescribed by law;

9. To exercise the powers conferred by law in relation to the estates of persons absconding and leaving their families chargeable to the public;

10. To let to bail persons indicted therein for any crime triable therein as provided by law;

11. To let to bail persons committed to the prison of the county before indictment for any offense triable in the court;

12. To discharge persons who have remained in prison without indictment or trial in the cases prescribed by law;

13. To revoke licenses in the cases and mode prescribed by law;

14. To grant new trials in all cases tried therein;

15. To execute such other powers and duties as may be conferred by statute, or are now defined by special statute relating thereto.

See § 961, *post*.

The history of courts of sessions is given in *People v. Bradner*, 107 N. Y. 7; *People v. General Sessions*, 15 Abb. Pr. 59.

Where an indictment is found in a court of oyer and terminer, to give jurisdiction to the court of sessions to try it, there must be an order of the oyer and terminer remitting it to the sessions for trial. *People v. Bradner*, 107 N. Y. 1.

Notice to defendant is not necessary. *Myers v. People*, 14 Hun, 416; *Leigh-ton v. People*, 88 N. Y. 117.

As to granting new trials, see *McFall v. People*, 18 Hun, 382.

As to appeals from courts of special sessions to courts of sessions, see §§ 742-772, *post*.

Where a court of sessions during a trial adjourned to a specified day, but because of a blizzard, could not convene until a later day, *held* error to proceed with the trial, though defendant did not object. *People v. Sullivan*, 49 Hun, 333.

§ 40. Indictments to be sent to oyer and terminer. — A court of sessions must send every indictment there found for a crime not triable therein to the court of oyer and terminer of the county, or to a city court having jurisdiction to try and determine the same.

As to removal of indictments, see § 344, *post*.

§ 41. Other indictments may be sent to oyer and terminer. — A court of sessions may send an indictment pending therein to the court of oyer and terminer of the same county, to be determined according to law, and if such indictment is remitted back without trial by the court of oyer and terminer, the court of sessions may proceed thereon.

See § 344, *post*; *People v. Bradner*, 107 N. Y. 5; *Leighton v. People*, 88 id. 117; 10 Abb. N. C. 261.

§ 42. By whom held. — A court of sessions must be held by the county judge, with two justices of sessions to be designated according to statute. If the justices of sessions, or either of them, fail to attend the commencement of, or during the term, or if his office at such time is or becomes vacant, the county judge by an order entered in the minutes, may designate any justice of the peace of the county to serve as justice of sessions during the term, or if the order is made by reason of non-attendance, until the absentee attends.

See State Const., art. VI, § 15; Laws 1883, chap. 111; *Cyphers v. People*, 31 N. Y. 373; 5 Park. 666.

On the trial of an indictment in the court of sessions, it is error for the county judge to substitute a justice of the peace for one of the justices of sessions, who has sat during the impaneling of the jury and a portion of the trial, and who abandons the bench. *Blend v. People*, 41 N. Y. 604.

In *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349, it was *held* that a court of sessions does not lose jurisdiction because one of its members is called from the bench as a witness in the case, and is sworn and testifies as such.

But his becoming a witness is error, and if objection be made and exception taken, it is fatal to the judgment. *People v. Dohring*, *supra*.

A county judge who, with two justices constituting a court of general sessions, has tried a person indicted for larceny, has no authority to receive the verdict of the jury in the absence of those justices from the court-room, and

of one of them from the court-house. The verdict must be received by the court before which the trial was had, otherwise it is a nullity, and no authority for a sentence. *Hinman v. People*, 13 Hun, 266.

Failure of defendant to object to the verdict being received by the county judge alone, at the time of its reception, or the asking to have the jury polled, do not preclude the prisoner from afterward insisting upon the objection. *Id.*

See, also, *People v. Shaw*, 63 N. Y. 36; *People v. Bork*, 2 N. Y. Cr. Rep. 75; 31 Hun, 371.

§ 43. Justice disqualified.—Whenever a justice of sessions is disqualified to act in any cause or proceeding pending in a court of sessions, the county judge must designate some other justice of the peace of the county, to act as member of the court during the trial or determination of such cause or proceeding.

See Laws 1883, chap. 111.

§ 44. Justice disqualified.—If the county judge is, for any cause, incapable of acting in any criminal action or proceeding pending in the court of sessions, the court must transfer the same to the court of oyer and terminer of the county, or to a city court having jurisdiction of such an action or proceeding, or may request the county judge of any other county, except New York and Kings, to preside at and hold courts of sessions and county courts in said county.

§ 45. When and where held; jurors.—A court of sessions must be held at such times as the county judge of the county, by order, designates, and at the place where the county courts are held for the trial of issues of fact by a jury. Such order must designate the terms at which a grand or petit jury, or both, or neither, is required to attend; and neither a grand jury nor a petit jury is required to be drawn, or summoned to attend a term thus designated to be held without a jury. The order must be published in a newspaper printed in the county, for four successive weeks previous to the time of holding the first term under such order.

See *People v. Moneghan*, 1 Park. 570; *People v. Wilcox*, 23 How. Pr. 297; *Cyphers v. People*, 31 N. Y. 373; 5 Park. 666.

This section is a distinct enactment, under which grand juries may be drawn and summoned for courts of sessions in the different counties of the state, except New York county, and an indictment found in the court of sessions of Queens county is valid where the grand jury is organized in accordance with the provisions of said section, viz., where it is held in pursuance of an order

of the county judge designating the times when courts of sessions will be held at the place where county courts are held, etc., and designating the terms at which a grand or petit jury, or both, or neither, is required to attend, which order has been published in a newspaper printed in the county, for four successive weeks previous to the time of holding the first term under said order. *People v. Rugg*, 98 N. Y. 537; 3 N. Y. Cr. Rep. 172. See *People v. Bates*, 38 Hun, 180.

§ 46. **Jurors, how drawn.** — If a county judge fail to designate the term at which a grand and petit jury is required to attend, the grand and petit jurors must be drawn and summoned for each term mentioned in the order mentioned in the last section.

See § 226, *post*; *People v. Rugg*, 98 N. Y. 546; 3 N. Y. Cr. Rep. 177.

§ 47. **Clerk.**—Except in the city and county of New York and the county of Kings, the clerk of the county is the clerk of the court of sessions thereof.

§ 48. **Writ or process.** — Every writ or process issued out of a court of sessions may be tested on any day of the term in which the court is sitting, and be made returnable on any other day of the same term, or at the next term.

§ 49. **Compensation of justice.**— A justice of sessions is entitled to receive three dollars for each day's attendance at a court of sessions and to five cents a mile for traveling expenses in coming to and returning from the court. The justices of the sessions in the county of Kings, shall each receive the compensation allowed to them by law in force before the adoption of this Code.

CHAPTER III.

THE COURT OF GENERAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK AND THE COURT OF SESSIONS IN THE COUNTY OF KINGS.

SECTION 50. This court continued; proceedings now pending.

51. Its jurisdiction.

52. Division of court.

53. Parts, by whom held.

54. When held and its duration.

55. Accommodation for court and officers.

§ 50. This court continued; proceedings now pending.

—The courts known as the court of general sessions in and for the city and county of New York, and the court of sessions in and for the county of Kings are continued, with the jurisdiction conferred by the next two sections and no other. But nothing contained in this section affects their jurisdiction of actions and proceedings now pending therein.

See *Laws* 1851, chap. 441; *Laws* 1855, chap. 337; *Laws* 1857, chap. 124; *Laws* 1859, chap. 208; *Laws* 1862, chap. 10; *Laws* 1860, chap. 508.

§ 51. Its jurisdiction.—The court of general sessions of the city and county of New York and the court of sessions of the county of Kings have jurisdiction :

1. To try, determine and punish according to law, all crimes cognizable within their respective counties, including crimes punishable with death or imprisonment in the state prison for life;

2. To exercise, in cases arising in their respective counties, the same powers as are conferred by this Code upon courts of sessions in other counties ;

3. To try and determine any indictment found in the court of oyer and terminer of the county, which has been sent by order of that court to and received by the court of sessions therein, and

4. To exercise such powers as are now prescribed by special statute relating thereto.

As to the court of general sessions in the city and county of New York see Consolidation Act (*Laws* 1882, chap. 410), § 1514 *et seq.*

The court of general sessions of the city and county of New York has no jurisdiction to discharge a prisoner committed by a police magistrate in default of giving the undertaking required by section 89, Code of Criminal Procedure, to keep the peace. *People v. Boyle*, 2 N. Y. Cr. Rep. 54.

An indictment for murder found in the general sessions of New York may be transferred to the oyer and terminer for trial either before or after arraignment. *Thompson v. People*, 6 Hun, 185; *Dolan v. People*, *id.* 493; 64 N. Y. 485.

On error, an order for the removal of the case from the oyer and terminer to the court of sessions need not appear on the record. *May v. People*, 12 Hun, 380.

Has power to discharge a jury in case of felony, if unable to agree. *People v. Goodwin*, 18 Johns. 187.

The court of general sessions of New York has power to grant new trials upon the merits. *People v. Powell*, 9 Abb. Pr. 91; *Loneragan v. People*, 39 N. Y. 89, reversing 50 Barb. 266; 6 Park. 209; and overruling *People v. N. Y. Gen. Sess.*, 15 Abb. 59; and *Ex parte Marks*, 14 *id.* 105, *n.*

The general sessions have jurisdiction over offenses committed on Governor's Island. *People v. Lent*, Wheeler Crim. Cas. 548.

May try a prisoner on a charge of stealing corporation notes which were in circulation. *Linnenden's Case*, 1 C. H. Rec. 30.

It is the duty of the New York court of sessions to send to the oyer and terminer all indictments for offenses which they cannot try. *People v. Shepard*, 11 Abb. Pr. 59; 19 How. 446.

The New York general sessions will not transfer to the oyer and terminer indictments found in the sessions except on motion, and on notice to the district attorney or the accused, as the case may be. *McFarland's Case*, 7 Abb. (N. S.) 848.

After affirmance in court of appeals, court of sessions may re-sentence a prisoner. *Walters v. People*, 19 Abb. 212.

New York general sessions has all the power of a court of oyer and terminer. *People v. Goodwin*, 18 Johns. 187.

§ 52. Division of court. — The court of general sessions of the city and county of New York is divided into three parts.

§ 53. Parts, by whom held. — Any one of the three parts of the court of general sessions of the city and county of New York may be held by the recorder of the city of New York, or the city judge, or the judge of the court of general sessions. A judge of the court of common pleas for the city and county of New York may also hold it. The court of sessions of the county of Kings must be held by the county judge of 'the county of Kings, with two justices of the sessions, designated according to statute.

§ 54. When held and its duration. — Each part of the court of general sessions in and for the city and county of New York, may be held each month, commencing on the first Monday and continuing so long as, in the opinion of the judge sitting and of the district attorney, the public interest requires, but one part only is required to be held during the months of July and August, and two parts only during the rest of the year.

The provision of the act of 1859 authorizing the court of sessions of any county of this state to continue its sittings so long as may be necessary for the determination of any cases, is applicable to the court of general sessions of New York. *Lowenberg v. People*, 27 N. Y. 336; 26 How. 202; 5 Park. 414; *Ferris v. People*, 31 How. 140; 35 N. Y. 125; 48 Barb. 17; 1 Abb. (N. S.) 193.

While prolonging its session for the purpose of concluding a trial, the court may pass sentence on a prisoner convicted before the expiration of the term. *Lowenberg v. People*, 27 N. Y. 336.

§ 55. **Accommodation for court and officers.**—The courts have the same power to direct suitable provisions to be made for their accommodation as is now possessed by the supreme court. The recorder, city judge, and judge of the court of general sessions of the city and county of New York must appoint a clerk, and not more than four deputy clerks, two interpreters and two stenographers, the clerk and deputy clerks so appointed must act also as clerks of the court of oyer and terminer in the city and county of New York. The county judge of the county of Kings shall, by writing, filed with the county clerk, appoint a clerk of the court of sessions of the county, who shall be removable by him at any time, for incompetency, negligence or official misconduct, in which case he may appoint another. The county clerk of the county of Kings must deliver to the clerk of the sessions all books and records of the court of sessions in his custody. The clerk of the sessions must appoint a deputy clerk, a first assistant clerk and not more than three second assistant clerks, and such clerk, deputy and assistants shall receive salaries, respectively, as that now paid to the clerk, deputy clerk and assistant clerk serving in that county, payable monthly by the treasurer of the county. Such court of sessions shall by an order entered in its minutes adopt a seal, which seal when so adopted shall be the seal of the court of sessions of the county of Kings. [*Amended 1892, ch. 137 ; in effect March 16, 1892.*]

TITLE VI.

OF THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS.

CHAPTER I. The special sessions, except in the cities of New York and Albany.

II. The special sessions in the city and county of New York.

III. The special sessions of the city of Albany.

IV. The police courts.

CHAPTER I.

THE SPECIAL SESSIONS EXCEPT IN THE CITIES OF NEW YORK AND ALBANY.

SECTION 56. Jurisdiction of courts.

57. Exclusive jurisdiction.

SECTION 58. Limitation.**59. Trial and punishment of certain crimes.****60. Special sessions in Brooklyn.****61. Id., in Oswego.****62. By whom held.****63. Recorder of a city to hold court.**

§ 56. Jurisdiction of courts. — Subject to the power of removal provided for in this chapter, courts of special sessions, except in the city and county of New York and the city of Albany, have in the first instance exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties, as follows:

1. Petit larceny, charged as a first offense.
2. Assault in the third degree.
3. Racing, running or testing the speed of any animal within one mile of the place where any court is held.
4. Wrongfully severing any produce or article from the freehold, not amounting to grand larceny.
5. Selling poisonous substances not labeled as required by law.
6. Wrongfully and maliciously removing, defacing or cutting down monuments or marked trees.
7. Wrongfully destroying or removing mile-stones, mile-boards or guide-boards, or altering or defacing any inscription thereon.
8. Wrongfully destroying any public or toll-gate or turnpike gate.
9. Intoxication of a person engaged in running any locomotive engine upon any railroad, or while acting as conductor of a car, or train of cars, on any such railroad, or a misdemeanor committed by any person on a railroad car or train.
10. Setting up or drawing unauthorized lotteries, or printing and publishing an account of any such illegal lottery, game, or device, or selling lottery tickets, or procuring them to be sold, or offering for sale or distributing any property depending upon any lottery, or for selling any chances in any lottery contrary to the provisions of law.
11. Unlawfully running, trotting or pacing horses or any other animal.

12. Making or selling slung-shot or any similar weapon.

13. Unlawfully disclosing the finding of an indictment.

14. Unlawfully bringing to or carrying letters from any county jail, penitentiary or state prison.

15. Unlawfully destroying or injuring any mill-dam or embankment necessary for the support of such dam.

16. Unlawfully injuring any telegraph wire, post, pier, abutment, materials or property belonging to any line of telegraph.

17. Unlawfully counterfeiting any representation, likeness, similitude or copy of a private stamp, wrapper or label of any mechanic or manufacturer.

18. Malicious trespass on lands, trees or timber, or injuring any fruit or ornamental or shade trees or vines.

19. Maliciously breaking or lowering any canal walls, or wantonly opening any lock-gate, or destroying any bridge, or otherwise unlawfully injuring such canal or bridge.

20. Unlawfully counterfeiting or defacing marks on packages.

21. Unlawfully setting fire to wood or fallow land, or allowing the same to extend to lands of others, or unlawfully refusing to extinguish any fire.

22. Unlawfully or negligently cutting out, altering or defacing any mark on any logs, timber, wood or plank, floating in any waters of this state, or lying on the banks or shores of any such waters, or at any saw-mills, or on any island where the same may have drifted.

23. Unlawfully frequenting or attending a steamboat landing, railroad depot, church, banking institution, broker's office, place of public amusement, auction-room, store, auction sale at private residence, passenger car, hotel, restaurant, or at any other gathering of people.

24. Unlawfully taking and carrying away the oysters of another, lawfully planted upon the bed of a river, bay, sound or other waters within the jurisdiction of this state.

25. Removing property out of the county, with intent to prevent the same from being levied upon by execution, or secreting, assigning, conveying or otherwise disposing of property, with intent to defraud any creditor, or to prevent the property being made liable for the payment of debts, or for receiving property with such intent.

26. Driving any carriage upon any turnpike, road or highway for the purpose of running horses.

27. Cruelty to animals or children.

28. Cheating at games.

29. Winning or losing at any game or play, or by any bet, as much as twenty-five dollars within twenty-four hours.

30. Selling liquors in a court-house or jail contrary to law.

31. Exposure of the person contrary to law.

32. Crimes against the provisions of existing laws for the prevention of wanton or malicious mischief.

33. When a complaint is made to or a warrant is issued by a committing magistrate, for a violation of the laws relating to excise and the regulation of taverns, inns and hotels, or for unlawfully selling or giving to any Indian spirituous liquors or intoxicating drinks.

34. Frauds on hotel, inn, tavern and boarding-house keepers.

35. All violations of the provisions of the agricultural law.

36. Such other jurisdiction as is now provided by special statute or municipal ordinance authorized by statute.

In effect as amended, May 24, 1893; Laws 1893, chaps. 570, 150.

See 28 Alb. L. J. 520. For history of courts of special sessions, see *People v. Kennedy*, 2 Park. 319.

In *People v. Austin*, 49 Hun, 397, the court say: "Article 6 of the constitution of the state of New York, section 26, contains the following provision: 'Courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.' After the adoption of that section the legislature passed chapter 390 of the Laws of 1879, which provided, viz.: 'Courts of special sessions * * * shall, in addition to the powers now possessed by them, have also exclusive jurisdiction in the first instance to hear and determine the following cases:' Then the statute contains six enumerations of offenses. Shortly thereafter, a controversy arose in the courts as to whether the statute was constitutional or not. Its validity has been sustained. *Devine v. People*, 20 Hun, 98; *People, ex rel. Comaford, v. Dutcher*, id. 241; *People, ex rel. Stetzer, v. Rawson*, 61 Barb. 619; *People, ex rel. Murray, v. Justices*, 74 N. Y. 406; *People, ex rel. Comaford, v. Dutcher*, 83 id. 240."

In *People v. Starks*, 17 State Rep. 238, the court say: "A court of special sessions is not a continuing court. It is organized and exists only for the trial of each particular case and is *functus officio* when the judgment is rendered therein. *Lattimore v. People*, 10 How. Pr. 336. Even the certificate of the entry of judgment, which operated as a warrant of commitment, and the return of the record on appeal are acts of the justice who held the court and not of the court of special sessions."

This section does not prevent a jury in oyer and terminer or sessions from finding a verdict of petit larceny where a prisoner is on trial under indictment for grand larceny. *People v. McTamoney*, 30 Hun, 505; 56 How. 70; 18 Abb. N. C. 55.

The act of 1879, chapter 390, which conferred upon courts of special sessions, except in New York and Albany, exclusive jurisdiction over cases of simple assault and battery, was a general act and was repealed by the Code of Criminal Procedure (§ 56, etc.). *Matter of Lord*, 10 Abb. N. C. 293; 63 How. 97.

In *People v. Palmer*, 8 State Rep. 499, Palmer was indicted for assault in the first degree and convicted of assault in the third degree. Having obtained a new trial, his counsel moved for an order that he be tried only for assault in the third degree. *Held*, that such an order might properly make a question as to the jurisdiction of the court of oyer and terminer under this section, or of any court under section 35 of the Penal Code. That as the case now stands, he cannot be harmed. Motion denied.

In *People v. Cook*, 45 Hun, 37, the court say: "We do not understand that it is essential to the jurisdiction of a court of special sessions, in a case of petit larceny, that the information or the warrant should allege that the crime charged is a first offense. If it be a first offense in fact, the court has jurisdiction to try the case, and it is to be deemed a first offense unless the contrary is charged. But if such allegation is material for any purpose, the defendant is not harmed by its omission. The provision requiring such allegation is in the interest of the public to prevent criminals guilty of a second offense from escaping the full measure of punishment imposed by statute (Penal Code, § 688), and which courts of special sessions have not the power to inflict."

See *People v. Sadler*, 2 N. Y. Cr. Rep. 438.

In *People v. Palmer*, 109 N. Y. 416, the court say: "A charge of assault in the third degree seems exclusively cognizable in the first instance by the court of special sessions, except a certificate that it should be prosecuted by indictment be allowed by the county judge."

See opinion of Bockes, J., at general term in this case, 43 Hun, 405; 5 N. Y. Cr. Rep. 101, for discussion of the limitation of subdivision 2.

Subdivision 12 does not repeal the provisions of the excise law (Act 1857, chap. 628, § 17, amended act 1869, chap. 856, § 2), providing for the punishment of public intoxication. *People v. Burleigh*, 1 N. Y. Cr. Rep. 522.

Subdiv. 24. In *People v. Beatty*, 39 Hun, 476; 4 N. Y. Cr. Rep. 287, it was held that the objection that the prefix "un" was omitted from the word "lawfully" in the charge made against defendant in a court of special sessions for unlawfully taking and carrying away oysters from certain oyster beds, cannot be urged on appeal for the first time when it is not specified in the affidavit, required by section 751 of the Code of Criminal Procedure. *It seems*, that such an objection, if properly raised, would be sustained.

During a preliminary hearing on a complaint to determine whether a warrant should issue, the attorney for the complainant notified the justice that the people would proceed no further before him, but would go before the grand jury; whereupon the justice sent the papers to the district attorney and did nothing further, though no order of discontinuance was entered. *Held* to amount to a withdrawal and discontinuance of the case, surrendering the justice's jurisdiction and giving the grand jury jurisdiction of the complaint. *People v. Andrews*, 115 N. Y. 427; 12 Crim. Law Mag. 227.

§ 57. **Exclusive jurisdiction.**—Upon filing with the magistrate before whom is pending a charge for any of the crimes specified in the last section, a certificate of the county judge of the county, or of any justice of the supreme court, that it is reasonable that such charge be prosecuted by indictment, and fixing the sum in which the defendant shall give bail to appear before the grand jury; and upon the defendant giving bail as specified in the certificate, all proceedings before the justice shall be stayed; and he shall, within five days thereafter, make a return to the district attorney of the county of all proceedings had before him upon the charge, together with such certificate and the undertaking given by the defendant thereon, and the district attorney shall present such charge to the grand jury; provided, however, that no such certificate shall be given except upon at least three days' notice to the complainant or to the district attorney of the county of the time and place for the application therefor.

See references under last section; *People v. McGann*, 43 Hun, 55; *People v. Cooper*, 42 id. 196; *People v. Palmer*, 6 State Rep. 841.

§ 58. **Limitation.**—When a person is brought before a magistrate charged with the commission of any of the crimes mentioned in section fifty-six, and asks that his case be presented to the grand jury, the proceedings shall be adjourned for not less than five nor more than ten days, and if on or before the adjourned day the certificate mentioned in section fifty-seven is not filed with the magistrate before whom the charge is pending, and bail given by the defendant as therein prescribed, the magistrate shall proceed with the trial, and when the defendant is brought before the magistrate, it shall be the duty of the magistrate to inform him of his rights under section fifty-seven and this section.

See *People v. McGann*, 43 Hun, 56; *People v. Starks*, 17 State Rep. 237.

It is not essential to a valid conviction that the court inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. *People v. Goodwin*, 5 Wend. 251.

By electing to be tried in special sessions, prisoner waives all objections to jurisdiction. *Gill v. People*, 3 Hun, 187; 60 N. Y. 643. See, also, *People v. Mallon*, 39 How. 454.

§ 59. **Trial and punishment of certain crimes.**—A court of special sessions having jurisdiction in the place where

any of the crimes specified in section fifty-six is committed has jurisdiction to try and determine a complaint for such crime, and to impose the punishment prescribed upon conviction, unless the defendant obtains the certificate and gives the bail mentioned in section fifty-seven.

See *People v. McGann*, 43 Hun, 56; *People v. Austin*, 49 id. 396.

§ 60. **Special sessions in Brooklyn.**— Subject to the power of removal provided for by sections fifty-seven and fifty-eight of this Code, the courts of special sessions in the city of Brooklyn shall, in the first instance, have exclusive jurisdiction to try and determine all complaints for misdemeanors committed in said city, where the term of imprisonment does not exceed one year, with or without fine, excepting conspiracy, and to impose the same punishment as is authorized by statute in like cases to be inflicted by the court of sessions of the county of Kings. Where any jury is required for the trial of any crime or misdemeanor in said courts of special sessions in the city of Brooklyn, the said courts shall have power to summons as many jurors as the court may deem necessary for the trial of such action or misdemeanor. The said court of special sessions in the city of Brooklyn shall have power to take bail in a reasonable amount for all misdemeanors, and shall have power to take undertakings in bail either with or without the defendant thereon in the discretion of the said court. All fines imposed by the said courts of special sessions in the city of Brooklyn, or by police magistrates in said city, upon defendants convicted in said courts or by such magistrates, of crimes, misdemeanors or violations of any city ordinance of the city of Brooklyn, which are paid by such defendants so convicted to the sheriff of the county of Kings or to the keeper of the penitentiary of said city, shall be paid monthly by the said sheriff or said keeper to the respective clerks of the courts in which the said fines were imposed; provided, however, that the said sheriff or keeper of the penitentiary of Kings county may, in his discretion, pay all of such fines so paid to them, or either of them, directly to the city treasurer of the city of Brooklyn. In an examination held in any criminal proceeding by a police magistrate in the city of Brooklyn, the testimony of each witness may, in the discretion of the magistrate, be taken as a deposition by

the official stenographer of the court in which said magistrate holds such examination. Such minutes of the testimony when so taken, and when certified by the stenographer and by the magistrate who held such examination, shall both with reference to such examination, and in all procedure in connection with such examination provided for by any section of this Code not inconsistent herewith, be regarded as actually taken down in writing by such magistrate and subscribed by the witness or witnesses at such examination.

See *People v. Green*, 4 N. Y. Cr. Rep. 443.

§ 61. **Special sessions in Oswego.**—The court of special sessions in the city of Oswego, where held by the recorder, has also jurisdiction over all cases of offenses, crimes against public decency, selling unwholesome provisions, cheats, breaches of peace, disobeying the commands of officers to render assistance in criminal cases, obstructing officers in the discharge of their duties, adulterating distilled spirits, not delivering marked property, defacing marks, or putting false marks on floating timber, all violations against the laws and ordinances of or applicable to the city, when such violation is a misdemeanor, and all attempts to commit any crimes herein named or referred to when such attempt is a misdemeanor.

§ 62. **By whom held.**—Unless provision is otherwise made by law, a court of special sessions must be held by one justice of the peace of the town or city in which the same is held, and sections two hundred and ninety-three, two hundred and ninety-four, two hundred and ninety-five, three hundred and ten, three hundred and thirty-two, three hundred and thirty-three, three hundred and thirty-four, three hundred and thirty-five, three hundred and thirty-six, three hundred and thirty-seven, three hundred and thirty-eight, three hundred and thirty-nine, three hundred and forty, three hundred and forty-one, three hundred and forty two, and three hundred and fifty-nine to four hundred and fifty, both inclusive, shall apply as far as may be to proceedings in all courts of special sessions or police courts.

See *People v. Bates*, 88 Hun, 181; *Matter of Bray*, 34 State Rep'r, 642.

§ 63. Recorder of a city to hold court.— A recorder of a city has power to hold a court of special sessions therein.

See *People v. French*, 32 Hun, 116; *People v. Cooper*, 42 Id. 197.

CHAPTER II.

THE SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.

SECTION 64. Jurisdiction.

65. Officers, how appointed.

66. Term of office.

67. Court, when held.

§ 64. Jurisdiction.— The court of special sessions in the city and county of New York has jurisdiction :

1. To try and determine according to law all complaints for misdemeanors, unless the defendant elects to be tried at the court of general sessions, or the court of special sessions sends the case to the court of general sessions for trial ;

2. To remit fines imposed by it, and in place of the fine remitted, substitute, in its discretion, imprisonment.

3. By an order entered in its minutes, to declare forfeited the recognizance of a defendant, taken by the court, to appear thereat, upon his failure so to appear ;

4. To impose the same punishment as is authorized by statute to be inflicted in like cases tried in the court of general sessions of the peace of that city and county ;

5. By warrant attested in the name of any one of the justices authorized to hold the court, signed by the clerk thereof, and entered in the minutes of the court, to enforce its judgments and orders ; to bring before the court all accused persons for trial and judgment in all cases in which it has jurisdiction ; to issue subpoenas for the attendance of witnesses, attachments for contempt, and other process necessary for the proper conduct of the court ;

6. To require the principal in a recognizance to appear at the court, and enter into a further recognizance to keep the peace, or to be of good behavior, or both, toward the people of the state, for a period not exceeding one year, and in default thereof to commit him to prison till he be discharged therefrom according to law.

See Laws 1858, chap. 282; Laws 1859, chap. 491; Laws 1863, chap. 563; Laws 1866, chap. 409; Laws 1871, chap. 302; Laws 1870, chap. 30; Laws 1870, chap. 983, § 49; *People v. Hogan*, 123 N. Y. 219; 55 Hun, 894; *Matter of Bray*, 84 State Rep'r, 642.

The court of special sessions have no jurisdiction of a prisoner who, on his committal, entered into a recognizance to appear at general sessions. *People, ex rel. Doyle, v. Johnson*, 10 Abb. 294; 19 How. 11.

Three justices are necessary to constitute a court of special sessions in the city of New York. Laws 1858, chap. 282.

Hence a commitment and conviction by two only is void as without jurisdiction. *Devine's Case*, 11 Abb. 90; 21 How. 80; 5 Park. 62.

The special sessions cannot acquire jurisdiction to try a prisoner for a crime unless he expressly waives the right to be tried by a jury. *People v. Mallon*, 89 How. 454.

Petit larceny is triable under this section. *People v. Finn*, 87 N. Y. 533.

As to right of police magistrates to commit disorderly persons since Penal Code took effect, see *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 57.

In *People v. Finn*, 87 N. Y. 533, the warrant of commitment issued upon a judgment of the court of special sessions stated that the defendant was convicted of the "misdemeanor of petit larceny." Held, a sufficient description of the offense.

§ 65. **Officers, how appointed.** — The police justices of the city and county of New York, by the vote of a majority, have the exclusive power to appoint the clerk, deputy clerk, stenographer, interpreter and other officers of the court of special sessions in the city and county of New York.

§ 66. **Term of office.** — The term of office of the clerk and deputy clerk of the court of special sessions in the city and county of New York is the same as the term of office of the police justices of that city.

§ 67. **Court, when held.** — The court of special sessions in the city and county of New York, may be held as often and at such times as the justices thereof may think expedient.

CHAPTER III.

THE SPECIAL SESSIONS IN THE CITY OF ALBANY.

SECTION 68. Jurisdiction.

69. By whom held.

SECTION 70. Inability of judge.

71. Officers to attend.

72. Clerk.

73. Court, when and where held.

§ 68. **Jurisdiction.**— The court of special sessions in the city of Albany has jurisdiction :

1. To try and determine all cases of petit larceny charged as a first offense, and all misdemeanors, not being infamous crimes, committed within the city ;

2. To take recognizances, to appear before the court at a succeeding term from persons charged with a crime or misdemeanor, triable therein ;

3. To impose and enforce sentence of fine or imprisonment, or both, in the discretion of the court, in all cases within its jurisdiction, upon conviction, to the same extent as the court of sessions of the county of Albany could do in like cases ;

4. To punish a contempt of court in the same manner and to the same extent as the court of oyer and terminer of the county could do in like cases ;

5. In cases where a jury trial is demanded by a defendant, to draw from the jury box containing the names of jurors who reside in the city of Albany such number of names as the recorder or county judge may direct, and to require the sheriff of the county to summon the persons so drawn to appear at the time designated for trial, to impanel a jury of twelve men, to require the attendance of additional jurors and to punish a juror or witness neglecting to appear, in the same manner and to the same extent as the court of oyer and terminer of the county could do in like cases ;

6. On motion of the district attorney, to issue a warrant for the arrest of a person who neglects to appear agreeably to the requirements of a recognizance to appear thereat, commanding the officer executing the same to bring the party forthwith before the court, if in session, otherwise to commit him to the common jail of the county, there to remain until delivered by due course of law.

Under subdivision 1, the publication of a libel is not an "infamous crime." *People v. Parr*, 42 Hun, 816; 4 N. Y. Cr. Rep. 545.

§ 69. **By whom held.** — Upon charges for offenses triable by this court, the police magistrate or any other magistrate in the city

hearing the same, shall, if offered, take recognizances in the cases provided by law returnable at the court of special sessions; and all such recognizances as shall have been so taken shall be returned to and filed with the district attorney of the county of Albany. If no such recognizance be offered, the magistrate or magistrates shall commit the defendant to the common jail of the county of Albany until he shall be thence delivered in due course of law, and the trial of such person shall be had before the court of special sessions, except that where a police justice or other magistrate in this city has jurisdiction, the defendant may elect to be tried before such police justice or other magistrate.

§ 70. **Inability of judge.**—Whenever a person is brought before a police justice or other magistrate of the city, charged with any of the following crimes, viz.: Petit larceny charged as a first offense, offenses against the laws relating to excise and the regulation of taverns, inns and hotels, offenses being misdemeanors against the laws relating to gaming, assaults upon, and interference with a public officer in the discharge of his duty, and it shall appear to the magistrate that the crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must order him to be held to answer the charge before the court of special sessions.

§ 71. **Officers to attend.**—The court of special sessions in the city of Albany must be held by the recorder of the city, with or without one or more of the justices of the peace to be associated with him. In case of the absence or inability of the recorder to act, the county judge of the county of Albany must act in his place. If the recorder and county judge are both unable, by reason of absence or other cause, to hold the court, the clerk must adjourn the court to the next following Tuesday, and continue such adjournments until the recorder or county judge attends. Not more than two officers shall be designated or appointed by the sheriff or other authority to attend the court of special sessions of the city of Albany, unless the court shall, by an order entered in its minutes, require the attendance of a greater number.

§ 72. **Clerk.**—The county clerk of Albany county is clerk of the court of special sessions of the city of Albany, and must attend the same in person or by deputy.

§ 73. **Court, when and where held.**—The court of special sessions of the city of Albany must be held at the city hall in the city of Albany on Tuesday of each week, and may be held and continued for such length of time as it deems proper.

CHAPTER IV.

THE POLICE COURTS.

SECTION 74. Jurisdiction.

75. Election of justices.

76. Justice to take and file oath of office, etc.

77. Justice, how to hold office.

78. Compensation of justice.

§ 74. **Jurisdiction.**—Police justices have such jurisdiction, and such only, as is specially conferred upon them by statute. The courts held by police justices are called police courts, and courts of special sessions are also called police courts, and are so designated in different parts of the Code.

See *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 446.

No appeal lies from the judgment of a police justice unless a village charter or special statute confers such right. *People v. Trumble*, 29 Hun, 205; 1 N. Y. Cr. Rep. 443.

§ 75. **Election of justices.**—Upon the application in writing of not less than twenty-five electors, inhabitants of any incorporated village in this state in which no provision now exists for the election of a police justice, the board of trustees of such village may determine, by resolution to be entered in their minutes of proceedings, that a police justice should be elected for such village; and, if they so determine, the electors of the village may, at their next annual election, or at a special election to be called for the purpose, and to be conducted in the same manner as the annual election, choose a police justice, who must be a resident elector of the village; and thereafter a police justice must be elected in such village, at the annual charter election next preceding the expiration of a regular term, or at the next annual election after a vacancy, on the same ticket with the other elective village officers. Any vacancy must be filled by appointment by the board of trustees of the village.

See *Matter of McMahon*, 64 How. 285; 1 N. Y. Cr. Rep. 58.

§ 76. Justice to take and file oath of office, etc.—A police justice elected or appointed as prescribed in the last section must, before entering upon the duties of his office, and within fifteen days after receiving notice from the village clerk of his election or appointment, take, before the clerk, the constitutional oath of office, and file the same with the clerk, together with a bond with such sureties and in such amount as shall be approved by the board of trustees of the village, conditioned for the faithful performance of his official duties.

The following is the constitutional oath of office (Const., art. 11, § 1):

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of New York, and that I will faithfully discharge the duties of the office of _____, according to the best of my ability;" and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof:

"And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote," and no other oath, declaration or test, shall be required as a qualification for any office of public trust."

§ 77. Justice; how to hold office.—A police justice elected or appointed, as prescribed in section seventy-five, holds his office as follows:

1. If elected at the first election held after the creation of the office, he must enter upon the duties of his office immediately after qualifying, as prescribed in the last section, and may hold his office until and including the thirty-first day of December in the third year succeeding his election;

2. If elected at any subsequent election, except as prescribed in the next subdivision, he must enter upon the duties of his office on the first day of January succeeding his election, and may hold his office for three years;

3. If elected to fill a vacancy, he must enter upon the duties of his office immediately after qualifying, as prescribed in the last section, and may hold his office for the unexpired term;

4. If appointed, he must enter upon the duties of his office immediately after qualifying, as prescribed in the last section, and may hold his office until his successor is elected and qualifies.

§ 78. **Compensation of justice.** — A police justice cannot retain to his own use any costs or fees, but may receive for his services an annual salary, to be fixed in villages by the board of trustees, and in cities by the common council, except where the same is otherwise fixed by law; and such salary shall not be increased or decreased during his term of office.

PART II.

OF THE PREVENTION OF CRIME.

TITLE I. OF LAWFUL RESISTANCE.

II. OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

TITLE I.

OF LAWFUL RESISTANCE.

CHAPTER I. General provisions respecting lawful resistance

II. Resistance by the party about to be injured.

III. Resistance by other parties.

CHAPTER I.

GENERAL PROVISIONS RESPECTING LAWFUL RESISTANCE.

SECTION 79. Lawful resistance; by whom made.

§ 79. **Lawful resistance; by whom made.**— Lawful resistance to the commission of a crime may be made:

1. By the party about to be injured;
2. By other parties.

See 24 Alb. L. J. 1, 2.

CHAPTER II.

RESISTANCE BY THE PARTY ABOUT TO BE INJURED.

SECTION 80. In what cases; to what extent.

§ 80. **In what cases; to what extent.**— Resistance sufficient to prevent the crime may be made by the party about to be injured:

1. To prevent a crime against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

See Penal Code, 26, and note.

CHAPTER III.

RESISTANCE BY OTHER PARTIES.

SECTION 81. In what cases.

§ 81. In what cases.— Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the injury.

TITLE II.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

- CHAPTER I. Intervention of public officers in general.
- II. Security to keep the peace.
 - III. Police in cities and villages, and their attendance at exposed places.
 - IV. Prevention and suppression of riots.

CHAPTER I.

INTERVENTION OF PUBLIC OFFICERS IN GENERAL.

SECTION 82. In what cases.

82. Persons acting in their aid, justified.

§ 82. In what cases.— Crimes may be prevented by the intervention of the officers of justice :

1. By requiring security to keep the peace ;
2. By forming a police in cities and villages, and by requiring their attendance in exposed places ;
3. By suppressing riots.

See *post*, §§ 84-101, 102-117.

§ 83. Persons acting in their aid, justified.— When the officers of justice are authorized to act in the prevention of crime, other persons who, by their command, act in their aid, are justified in so doing.

See Penal Code, § 228, subd. 1.

CHAPTER II.

SECURITY TO KEEP THE PEACE.

- SECTION 84.** Information of threatened crime.
85. Examination of complainant and witnesses.
86. Warrant of arrest.
87. Proceedings, on complaint being controverted.
88. Person complained of, when to be discharged.
89. Security to keep the peace, when required.
90. Effect of giving or refusing to give security.
91. Person committed for not giving security, how discharged.
92. Undertaking, to be transmitted to sessions.
93. Security, when required, for assault, etc., in presence of a court or magistrate.
94. Appearance of party bound, upon his undertaking.
95. Person bound, may be discharged, if complainant does not appear.
96. Proceedings in sessions, on appearance of both parties.
97. Undertaking, when broken.
98. Undertaking, when and how to be prosecuted.
99. Security for the peace not required, except according to this chapter.

§ 84. Information of threatened crime.—An information may be laid before any magistrate that a person has threatened to commit a crime against the person or property of another.

See *People v. Boyle*, 2 N. Y. Cr. Rep. 54; *Wright v. Church*, 110 N. Y. 463.

To justify the issuing of a warrant to require a person to find sureties of the peace there must be a formal complaint in writing upon oath, in addition to the examination required by statute. *Bradstreet v. Furguson*, 17 Wend. 181; 23 id. 638.

§ 85. Examination of complainant and witnesses.—When the information is laid before a magistrate, he must examine on oath the complainant and any witnesses he may produce, and must reduce their examination to writing, and cause them to be subscribed by the parties making them.

To justify the issuing of a warrant the examination must declare the necessity of it. *Bradstreet v. Furguson*, 17 Wend. 181; 23 id. 638.

§ 86. Warrant of arrest.—If it appear from such examinations that there is just reason to fear the commission of the crime threatened, by the person complained of, the magistrate must issue a warrant, directed generally to the sheriff of the county, or any constable, marshal or policeman of the city or town, reciting the

substance of the information, and commanding the officer forthwith to arrest the person complained of, and bring him before the magistrate.

When a person uses abusive or reproachful language to the court it is sufficient cause for issuing warrant. *Richmond v. Dayton*, 10 Johns. 393.

So, also, where a prosecutor, in his own testimony, discloses his own infamy. *Carpenter's Case*, 1 C. H. Rec. 164.

Also where a person rents property for the purposes of prostitution. *People v. Parkes*, 15 How. 551.

There must, however, be a formal complaint to justify the issuing of a warrant. *Bradstreet v. Ferguson*, 17 Wend. 181; 23 id. 638.

§ 87. Proceedings, on complaint being controverted. —

When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses.

See *People v. Boyle*, 2 N. Y. Cr. Rep. 55.

In a summary proceeding to require a man to give sureties for his good behavior on the ground that he has abandoned his family, evidence is admissible that the complainant is not in fact his wife. *Duffy v. People*, 6 Hill, 75.

The question to be tried is, has the complainant just cause to entertain the fears expressed in his complaint. 26 Ind. 141; 21 id. 235; 35 id. 379; 48 id. 146.

§ 88. Person complained of, when to be discharged. —

If it appear that there is no just reason to fear the commission of the crime alleged to have been threatened, the person complained of must be discharged.

See *People v. Boyle*, 2 N. Y. Cr. Rep. 55.

§ 89. Security to keep the peace; when required. —

If, however, there be just reason to fear the commission of the crime, the person complained of may be required to enter into an undertaking, in such sum, not exceeding one thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to abide the order of the next court of sessions of the county, and in the meantime to keep the peace towards the people of this state, and particularly towards the complainant.

The court of general sessions of the city and county of New York has no jurisdiction to discharge a prisoner committed by a police magistrate in default of giving an undertaking required. *People v. Boyle*, 2 N. Y. Cr. Rep. 54.

Where a person uses abusive and reproachful language to a justice relative to his judicial conduct, the latter may issue his warrant and require the

offender to find sureties for his good behavior. *Richmond v. Dayton*, 10 Johns. 393.

A prosecutor who, in his own testimony, discloses his own infamy will be recognized for his good behavior. *Carpenter's Case*, 1 C. H. Rec. 164.

A landlord who rents a house for purposes of prostitution may be held to bail under the statute. *People v. Parkes*, 15 How. 551.

A person who neglects to support his wife may be held under the statute. *People v. Mitchell*, 2 S. C. 172.

Though the evidence comes short of making out a clear case of crime, the court may be justified in requiring sureties. 1 Bish. Crim. Law, § 945; *Ritchey v. Davis*, 11 Iowa, 124; *Steele v. State*, 4 Ind. 561; *Com. v. Ward*, 4 Mass. 497; *Com. v. Morey*, 8 id. 78; *Conklin v. State*, 8 Ind. 458; *Long v. State*, 10 id. 353; *Collins v. State*, 11 id. 312.

The court may also, on the coming in of a verdict of not guilty, order the prisoner to give sureties. *Bamber v. Com.*, 10 Barr. 339, *Respublica v. Donegan*, 2 Yeates, 437; *People v. Berner*, 13 Johns. 383; *Doyle's Case*, 19 Abb. Pr. 269.

Drunkenness with disorderly conduct not necessarily a breach of the peace (*Rankin v. Com.*, 9 Bush, 553); but libel is such a breach. *Com. v. Braynard*, 6 Pick. 113.

§ 90. **Effect of giving or refusing to give security.** — If the undertaking required by the last section be given, the party complained of must be discharged. If it is not given, the magistrate must commit him to prison, specifying in the warrant the cause of commitment, the amount of security required, and the omission to give the same.

See *Wright v. Church*, 110 N. Y. 463.

It is sufficient in the *mittimus* to state that the party is convicted for refusing to give sureties. *Bradstreet v. Ferguson*, 17 Wend. 181; 23 id. 638.

It is not necessary to state in the *mittimus* the crime for which prisoner stands committed. *Id.*

A disorderly person may be committed until he find sureties to keep the peace. *Doyle's Case*, 19 Abb. 269.

When a justice of the peace, after an examination, has adjudicated that a person brought before him shall give sureties to keep the peace, and the prisoner has refused to do so, it is his duty to issue his warrant of commitment. *Gano v. Hall*, 5 Park. 651; 42 N. Y. 67.

Form of warrant on a refusal to give sureties. *Id.*

§ 91. **Person committed for not giving security; how discharged.** — If the person complained of be committed for not giving security, he may be discharged by any two justices of the peace of the county, or police or special justices of the city, upon giving the security.

§ 92. **Undertaking, to be transmitted to sessions.** — An undertaking given as provided in section eighty-nine, must be transmitted by the magistrate to the next court of sessions of the county.

§ 93. **Security, when required, for assault, etc., in presence of a court or magistrate.** — A person who, in the presence of a court or magistrate, assaults or threatens to assault another, or to commit a crime against his person or property, or who contends with another in angry words, may be thereupon ordered by the court or magistrate to give security as provided in section eighty-nine, or if he refuses to do so, may be committed as provided in section ninety.

Where a person uses abusive or reproachful language to a justice relative to his judicial conduct, the latter may issue his warrant. *Richmond v. Dayton*, 10 Johns. 898

§ 94. **Appearance of party bound, upon his undertaking.** — A person who has entered into an undertaking to keep the peace, must appear on the first day of the next term of the court of sessions of the county. If he do not, the court may forfeit his undertaking, and order it to be prosecuted, unless his default be excused.

§ 95. **Person bound, may be discharged if complainant does not appear.** — If the complainant do not appear, the person complained of may be discharged, unless good cause to the contrary be shown.

§ 96. **Proceedings in sessions, on appearance of both parties.** — If both parties appear, the court may hear their proofs and allegations, and may either discharge the undertaking, or require a new one, for a time not exceeding one year.

§ 97. **Undertaking, when broken.** — An undertaking to keep the peace is broken, on the failure of the person complained of to appear at the court of sessions, as provided in section ninety-four, or upon his being convicted of any crimes involving a breach of the peace.

§ 98. Undertaking, when and how to be prosecuted. — Upon the district attorney producing evidence of such conviction to the court of sessions to which the undertaking is returned, that court must order the undertaking to be prosecuted; and the district attorney must thereupon commence an action upon it in the name of the people of this state.

See *People v. Doyle*, 2 N. Y. Cr. Rep. 54.

§ 99. Security for the peace not required except according to this chapter. — Security to keep the peace or be of good behavior, cannot be required, except as prescribed in this chapter.

See *Matter of McMahon*, 64 How. 285; 1 N. Y. Cr. Rep. 58.

A justice before whom one has been convicted as a disorderly person has no power, singly, to take a recognizance for good behavior. *People v. Brown*, 23 Wend. 47.

Also, after a summary conviction as a disorderly person, recognizance for good behavior cannot be taken. *People v. Duffy*, 5 Barb. 205.

CHAPTER III.

POLICE IN CITIES AND VILLAGES, AND THEIR ATTENDANCE AT EXPOSED PLACES.

SECTION 100. Organization and regulation of the police.

101. Force to preserve the peace, at public meetings, when and how ordered.

§ 100. Organization and regulation of the police. — The organization and regulation of the police in the cities and villages of this state are governed by special statutes.

§ 101. Force to preserve the peace, at public meetings, when and how ordered. — The mayor or other officer having the direction of the police in a city or village, must order a force, sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is to be apprehended.

CHAPTER IV.

PREVENTION AND SUPPRESSION OF RIOTS.

- SECTION 102.** Powers of sheriff or other officer, in overcoming resistance to process.
103. His duty to certify to court the names of resisters and their abettors.
 104. Duty of a person commanded to aid the officer.
 105. When governor to order out a military force, to aid in executing process.
 106. Magistrates and officers to command rioters to disperse.
 107. To arrest rioters, if they do not disperse.
 108. Consequences of refusal to aid the magistrates or officers.
 109. Consequences of neglect or refusal of a magistrate or officer to act.
 110. Proceedings, if rioters do not disperse.
 111. Officers who may order out the military.
 112. Commanding officer and troops to obey the order.
 113. Armed force to obey orders.
 114. Conduct of the troops.
 115. Governor may, in certain cases, proclaim a county in a state of insurrection.
 116. May call out the militia.
 117. May revoke the proclamation.

§ 102. Powers of sheriff or other officer in overcoming resistance to process.— When a sheriff or other public officer, authorized to execute process, has reason to apprehend that resistance is about to be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper, and any military company or companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the resisters and their aiders and abettors, to be punished according to law.

See Penal Code, § 457.

The sheriff being *ex officio* a conservator of the public peace, it is his duty to arrest all persons, with their abettors, who oppose the execution of legal process. *Coyle v. Hurtin*, 10 Johns. 85.

He has also power, under the statute, to command a bystander to assist in overcoming a riotous assemblage. *Id.*

And those so ordered may arrest the offenders even during the temporary absence of the sheriff. *Id.*

And should those thus commanded, suffer an offender knowingly to escape, they would be liable to punishment. *Id.*

Under the Code of Procedure, §§ 185, 419, the coroner may call to his aid the

power of the county in a proper case, in executing an order of arrest in an action in which a sheriff is a party. *Slater v. Wood*, 9 Bosw. 16.

The mere fact that the officer, at the time of summoning the power of the county, had not proper cause for so doing, does not relieve the persons summoned, from the duty of obeying. *Slater v. Wood*, 9 Bosw. 16.

What are sufficient grounds for summoning assistance. *Id.* 46.

However, a person acting in aid of an officer, and by his commandment in overcoming resistance to the execution of a process is a trespasser, if the officer is not justified by the process. *Elder v. Morrison*, 10 Wend. 137; *Oystead v. Shed*, 12 Mass. 511.

The bystander obeys at his peril. If the officer has authority to do the act for the doing of which aid is required, the bystander is bound to obey and is justified; and if he refuses or neglects, is guilty of a misdemeanor. *Elder v. Morrison*, 10 Wend. 137; *Leonard v. Stacey*, 6 Mod. 140.

§ 103. His duty to certify to court the names of resisters and their abettors.—The officer must certify to the court from which the process issued the names of the resisters and their aiders and abettors, to the end that they may be proceeded against for contempt.

§ 104. Duty of a person commanded to aid the officer.—Every person commanded by a public officer to assist him in the execution of process, as provided in section one hundred and two, who, without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.

See Penal Code, § 456.

The bystander, however, obeys at his peril. If the officer has authority to do the act for the doing of which aid is required, the bystander is bound to obey and is justified; and if he refuses or neglects, he is guilty of a misdemeanor. *Elder v. Morrison*, 10 Wend. 137; *Coyles v. Hurtin*, 10 Johns. 85; *Slater v. Wood*, 9 Bosw. 16.

§ 105. When governor to order out a military force to aid in executing process.—If it appear to the governor that the power of the county is not sufficient to enable the sheriff to execute process delivered to him, he must, on the application of the sheriff, order such a military force from any other county or counties as is necessary.

§ 106. Magistrates and officers to command rioters to disperse.—When persons, to the number of five or more, armed with dangerous weapons, or to the number of ten or more, whether armed or not, are unlawfully or riotously assembled in a city, vil-

lage or town, the sheriff of the county and his under sheriff and deputies, the mayor and aldermen of the city, or the supervisor of the town, or president or chief executive officer of the village, and the justices of the peace or the police justices of the city, village or town, or such of them as can forthwith be collected, must go among the persons assembled and command them, in the name of the people of the state, immediately to disperse.

§ 107. **To arrest rioters, if they do not disperse.**— If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, or cause them to be arrested, that they may be punished according to law; and for that purpose, may command the aid of all persons present or within the county.

To convict of a riot it must be shown that defendant took an active part; mere presence not enough. *Scott's Case*, 2 C. H. Rec. 25; *Rodman's Case*, id. 88

It requires, however, no previous design or preconcert. *People v. Ferris*, 4 Hall L. J. 209.

If a crowd of three or more persons make an attack upon another with a preconcerted intent to commit an assault upon him, they are guilty of riot. *People v. White*, 55 Barb. 606; *Rodman's Case*, 2 C. H. Rec. 88. '1

§ 108. **Consequences of refusal to aid the magistrates or officers.**— If a person so commanded to aid the magistrates or officers, neglects to do so, he is deemed one of the rioters, and is punishable accordingly.

§ 109. **Consequences of neglect or refusal of a magistrate or officer to act.**— If a magistrate or officer having notice of an unlawful or riotous assembly, mentioned in section one hundred and six, neglects to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

§ 110. **Proceedings, if rioters do not disperse.**— If the persons assembled, and commanded to disperse, do not immediately disperse, any two of the magistrates or officers mentioned in section one hundred and six, may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary, to disperse the assembly and arrest the offenders.

§ 111. **Officers who may order out the military.**—When there is an unlawful or riotous assembly, with intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the state, and the fact is made to appear to the governor, or to a judge of the supreme court, or to a county judge, or to the sheriff of the county, or to the mayor, recorder or city judge of a city, either of those officers may issue an order directed to the commanding officer of a division, brigade, regiment, battalion or company, to order his command, or any part of it (describing the kind and number of troops), to appear at a specified time and place to aid the civil authorities in suppressing violence and enforcing the law.

§ 112. **Commanding officer and troops to obey the order.**—The commanding officer, to whom the order is given, must forthwith obey it; and the troops required must appear at the time and place appointed, armed and equipped with ammunition as for inspection, and render such aid.

§ 113. **Armed force to obey orders.**—When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, it must obey the orders in relation thereto, of either of the officers mentioned in section one hundred and eleven.

§ 114. **Conduct of the troops.**—Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the rioters to disperse, before an attack is made upon them by which their lives may be endangered.

§ 115. **Governor may, in certain cases, proclaim a county in a state of insurrection.**—When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county, by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officer having the process to execute it, he may, on the application of the officer, or of the district attorney or county judge of the county, by proclamation to be published in the state paper, and in such papers in the

county as he may direct, declare the county to be in a state of insurrection.

§ 116. **After proclamation.**— After the proclamation mentioned in the last section, the governor may order into the service of the state such number and description of volunteer or uniform companies, or other militia of the state, as he deems necessary, to serve for such term, and under the command of such officer or officers as he may direct.

§ 117. **May revoke the proclamation.**— The governor, when he thinks proper, may revoke the proclamation authorized by section one hundred and fifteen, or declare that it shall cease, at the time and in the manner directed by him.

PART III.

OF JUDICIAL PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS, BY IMPEACHMENT OR OTHERWISE.

TITLE I. OF IMPEACHMENTS.

II. OF THE REMOVAL OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND JUSTICE OF JUSTICES' COURTS AND THEIR CLERKS.

TITLE I.

OF IMPEACHMENTS.

- SECTION 118.** Impeachment to be delivered to president of the senate.
119. Copy of impeachment served on defendant.
120. Service, how made.
121. Proceedings, if defendant do not appear.
122. Defendant may object to deficiency of, or deny impeachment.
123. Form of objection or denial.
124. Proceedings thereon.
125. Two-thirds necessary to conviction.
126. Judgment on conviction, how pronounced.
127. Adoption of resolution.
128. Nature of the judgment.
129. Officer, when impeached, disqualified to act until acquitted.
130. Presiding officer, when president of the senate is impeached.
131. Impeachment, not a bar to indictment.

§ 118. Impeachment to be delivered to president of the senate. — When an officer of the state is impeached by the assembly, the articles of impeachment must be delivered to the president of the senate.

See Penal Code, § 723; State Const., art. VI, § 1.

An associate judge may deliver an opinion. A presiding judge is liable for preventing his associate from delivering his opinion. Addison's Trial, 114, 151; S. C., 4 Dall., 225; Porter's Trial, 61. See, also, Barnard's Trial.

§ 119. Copy of impeachment served on defendant. — The president of the senate must thereupon cause a copy of the articles of impeachment, with a notice to appear and answer the same, at the time and place appointed for the meeting of the

court to be served on the defendant not less than twenty days before the day fixed for the meeting of the court.

§ 120. **Service, how made.** — The service must be upon the defendant personally, or if he cannot, upon diligent inquiry, be found in the state, the court upon proof of that fact, may order publication to be made in such manner as it deems proper, of a notice requiring him to appear at a specified time and place, and answer the articles of impeachment.

§ 121. **Proceedings, if defendant do not appear.** — If the defendant do not appear, the court, upon proof of service or publication as provided in the last two sections, may of its own motion, or for cause shown, assign another day or place for hearing the impeachment; or may then, or at any other time which it may appoint, proceed in the absence of the defendant, to trial and judgment.

§ 122. **Defendant may object to sufficiency of, or deny impeachment.** — When the defendant appears, he must answer the articles of impeachment; which he may do, either by objecting to their sufficiency, or that of any article therein, or by denying the truth of the same.

§ 123. **Form of objection or denial.** — If the defendant object to the sufficiency of the impeachment, the objection must be in writing, but need not be in any specific form; it being sufficient, if it present intelligibly the grounds of the objection. If he deny the truth of the impeachment, the denial may be oral, and without oath, and must be entered upon the minutes.

§ 124. **Proceedings thereon.** — If an objection to the sufficiency of the impeachment be not sustained by a majority of the members of the court who heard the argument, the defendant must forthwith answer the articles of impeachment. If he plead guilty, or refuse to plead, the court must render judgment of conviction against him. If he deny the matters charged the court must, at such time as it may appoint, proceed to try the impeachment, and may adjourn the trial from time to time until concluded.

He may appear by counsel, as in civil actions. N.Y. Const., art. I, § 6; 8 R. S. 183, § 12. See, also, *Rathbun v. Sawyer*, 15 Wend. 451, and *Garling v. Van Allen*, 55 N. Y. 81.

§ 125. Two-thirds necessary to conviction. — The defendant cannot be convicted on an impeachment, without the concurrence of two-thirds of the members present during the trial; and if such two-thirds do not concur in a conviction, the defendant must be declared acquitted.

State Const., art. VI, § 1.

§ 126. Judgment on conviction, how pronounced. — After conviction the court must immediately, or at such other time as it may appoint, pronounce judgment, in the form of a resolution, entered upon the minutes of the court. The vote upon the passage thereof must be taken by yeas and nays, and must also be entered upon the minutes.

§ 127. Adoption of resolution. — On the adoption of the resolution by a majority of the members present, who voted on the question of acquittal or conviction, it becomes the judgment of the court.

§ 128. Nature of the judgment. — Upon conviction, the judgment must be either :

1. That the defendant be removed from office ; or
2. That he be removed from office and disqualified to hold and enjoy a particular office or class of offices, or any office of profit, trust or honor whatever under this state.

State Const., art. VI, § 1.

The law of 1816, providing that any person convicted of dueling, etc., may be adjudged disqualified from holding any office of trust or emolument, civil or military, is constitutional, and a conviction under it is valid. *Barker v. People*, 20 Johns. 457; 8 Cow. 686; 2 Wheel. C. C. 19.

§ 129. Officer, when impeached, disqualified to act until acquitted. — No officer shall exercise his office, after articles of impeachment against him shall have been delivered to the senate, until he is acquitted.

State Const., art. VI, § 1; 8 R. S. 184, § 19.

§ 130. Presiding officer, when president of the senate is impeached. — If the president of the senate be impeached, notice of the impeachment must be immediately given to the senate by the assembly, that another president may be chosen.

§ 131. Impeachment not a bar to indictment.— If the offense for which the defendant is impeached be a crime, the prosecution thereof is not barred by the impeachment.

State Const., art. VI, § 1.

TITLE II.

OF THE REMOVAL OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND JUSTICES OF JUSTICES' COURTS, AND THEIR CLERKS.

§ 132. Justices of the peace, police justices, justices of justices' courts, and their clerks, are removable by the supreme court at a general term.

State Const., art. VI, § 18.

The legislature may abolish or abridge the term of the office of police justice. *Coulter v. Murray*, 15 Abb. Pr. (N. S.) 129; *Wenzler v. People*, 58 N. Y. 516. See, also, *People v. Keeler*, 17 N. Y. 320; *People v. Shea*, 7 Hun, 309.

The power of removal of a police justice for misconduct, given to a mayor of a city by its charter, does not oust the supreme court of the jurisdiction conferred by this section. *Matter of King*, 25 State Rep. 792; 6 N. Y. Supp. 421.

PART IV.

OF THE PROCEEDINGS IN CRIMINAL ACTIONS PROSECUTED
BY INDICTMENT.

- TITLE I.** OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.
 - II. OF THE TIME OF COMMENCING CRIMINAL ACTIONS.
 - III. OF THE INFORMATION, AND PROCEEDINGS THEREON TO THE COMMITMENT INCLUSIVE.
 - IV. OF THE PROCEEDINGS AFTER COMMITMENT, AND BEFORE INDICTMENT.
 - V. OF THE INDICTMENT.
 - VI. OF THE PROCEEDINGS ON THE INDICTMENT BEFORE TRIAL.
 - VII. OF THE TRIAL.
 - VIII. OF THE PROCEEDINGS AFTER TRIAL, AND BEFORE JUDGMENT.
 - IX. OF THE JUDGMENT AND EXECUTION.
 - X. GENERAL PROVISIONS RELATING TO PUNISHMENT OF CRIME.
 - XI. OF APPEALS.
 - XII. OF MISCELLANEOUS PROCEEDINGS.

TITLE I.

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

- SECTION** 183. When a person leaves this state to elude its laws.
184. When a crime is committed partly in one county and partly in another.
185. When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof.
186. Jurisdiction of crime on board of vessel.
187. Of crime committed in the state on board of any railway train, etc.
188. Indictment for libel.
189. Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.
140. Conviction or acquittal in another county, a bar, where the jurisdiction is concurrent.

§ 133. When a person leaves this state to elude its laws. A person who leaves this state, with intent to elude any law thereof against duelling or prize-fighting, or challenges thereto,

or to do any act forbidden by such a law, or, who being a resident of this state, does an act out of it, which would be punishable as a violation of such a law, may be indicted and tried in any county of this state.

See 28 Am. Law Reg. (N. S.) 22; 6 Crim. Law Mag. 155; 12 id. 498.

An indictment for abortion, which charged defendant with doing the act constituting the crime, is sufficient although the proof shows that defendant was absent at the time the crime was committed, but that he counseled, induced and procured its commission. *People v. Bliven*, 112 N. Y. 79.

A citizen of this state, who has entered into a conspiracy to violate its laws, cannot escape punishment because the act he planned was accomplished during his absence from the state. *People v. Lyon*, 1 N. Y. Cr. Rep. 400; 99 N. Y. 219.

Where an offense is committed within this state by means of an innocent agent, the employer is guilty as a principal, and if found within this state may be tried therein, though he did no act in this state and was at the time the offense was committed in another state. *Adams v. People*, 1 N. Y. 178.

And it is no answer to an indictment, that the defendant owes allegiance to another state or sovereignty. *Adams v. People*, 1 N. Y. 178.

§ 134. When a crime is committed partly in one county and partly in another. — When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county.

See *People v. Dimick*, 107 N. Y. 83; 5 N. Y. Cr. Rep. 201; *People v. Crotty*, 30 State Rep. 45. 9 N. Y. Supp. 937.

§ 135. When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof. — When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

See *People v. Davis*, 56 N. Y. 95; 36 id. 77; *Archer v. State* (Ind.), 84 Alb. L. J. 50; *Matter of McFarland*, 59 Hun, 306.

This section is limited to courts proceeding by indictment and confers no jurisdiction on courts of special sessions or magistrates holding such courts. *People v. Bates*, 38 Hun, 181; 4 N. Y. Cr. Rep. 216.

Where the constitution provides that crimes shall be tried in the counties where committed, the legislature may not make an exception in case of crimes committed within one hundred yards of the county boundary. *State v. Lowe*, 21 W. Va. 783; 45 Am. Rep. 570.

§ 136. Jurisdiction of crime on board a vessel. — When a crime is committed in this state on board of a vessel navigating a river, lake or canal, or lying therein in the course of her voyage, or in respect to any portion of the cargo or lading of such boat or vessel, the jurisdiction is in any county through which, or any part of which, such river or canal passes, or in which such lake is situated or on which it borders, or in the county where such voyage terminates, or would terminate if completed.

An offense committed on board a vessel navigating a river must be tried in some county through which it passed, and not in its port of destination. *People v. Hulse*, 3 Hill, 309.

An offense committed on a steamboat close to the Long Island shore, in Suffolk county, upon a trip from the city of New York to Norwich, Conn., is not indictable in the county of New York. *Manly v. People*, 7 N. Y. 295; *Haskins v. People*, 16 id. 344.

In order to confer jurisdiction over an offense committed on board a boat upon a canal in respect to the cargo thereof, it must be averred in the indictment and proved that the crime was committed on board the boat or vessel, and on that trip or voyage she had passed through some part of the county where the indictment was found. *Larkin v. People*, 61 Barb. 226.

§ 137. Of crime committed in the state on board of any railway train, etc. — When a crime is committed in this state, in or on board of any railway engine, train or car, making a passage or trip on or over any railway in this state, or in respect to any portion of the lading or freightage of any such railway train or engine car, the jurisdiction is in any county through which, or any part of which, the railway train or car passes, or has passed in the course of the same passage or trip, or in any county where such passage or trip terminates, or would terminate if completed.

See *People v. Dowling*, 84 N. Y. 478; 23 Alb. L. J. 353.

§ 138. Indictment for libel. — When a crime of libel is committed by publication in any paper in this state, against a person residing in the state, the jurisdiction is in either the county where the paper is published, or in the county where the party libeled resides. But the defendant may have the place of trial changed to the county where the libel is printed, on executing a bond to the complainant in the penal sum of not less than two hundred and fifty dollars nor more than one thousand dollars, conditioned, in case the defendant is convicted, for the payment

of the complainant's reasonable and necessary traveling expenses in going to and from his place of residence and the place of trial, and his necessary expenses in attendance thereon, which bond must be signed by two sufficient sureties, to be approved by a judge of a court of record exercising criminal jurisdiction.

Whenever the crime of libel is committed against a person not a resident of this state, the defendant must be indicted and the trial thereof had in the county where the libel is printed and published. But if the paper does not, upon its face, purport to be printed or published in a particular county of this state, the defendant may be indicted and the trial thereof had in any county where the paper is circulated. In no case, however, can the defendant be indicted for the printing or publication of one libel in more than one county of this state.

[See Penal Code, § 249.

§ 139. Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent. — When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state.

See Penal Code, § 679; Fed. Const., Fifth Amendment.

§ 140. Conviction or acquittal in another county, a bar, where the jurisdiction is concurrent. — When a crime is within the jurisdiction of two or more counties of this state, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another.

TITLE II.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

Section 141. Prosecution for murder may be commenced at any time.

142. Limitation of five years:

143. Defendant out of state.

144. Indictment deemed found, when presented in court and filed.

§ 141. Prosecution for murder may be commenced at any time.—There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

§ 142. Limitation of five years.—An indictment for a felony, other than murder, must be found within five years after its commission, except where a less time is prescribed by statute. And an indictment for a misdemeanor must be found within two years after its commission.

See *People v. O'Donnell*, 46 Hun, 362; *People v. Durrin*, 2 N.Y.Cr. Rep. 333.

§ 143. Defendant out of state.—If, when the crime is committed, the defendant be out of the state, the indictment may be found within the term herein limited after his coming within the state; and no time during which the defendant is not an inhabitant of, or usually resident within, the state, is part of the limitation.

§ 144. Indictment deemed found when presented in court and filed.—An indictment is found, within the meaning of the last three sections, when it is duly presented by the grand jury in open court, and there received and filed.

TITLE III.

OF THE INFORMATION AND PROCEEDINGS THEREON TO THE COMMITMENT, INCLUSIVE.

- CHAPTER**
- I. The information.
 - II. The warrant of arrest.
 - III. Arrest by an officer under a warrant.
 - IV. Arrest by an officer without a warrant.
 - V. Arrest by a private person.
 - VI. Retaking, after an escape or rescue.
 - VII. Examination of the case, and discharge of the defendant or holding him to answer.

CHAPTER I.

THE INFORMATION.

- SECTION**
- 145. Information defined.
 - 146. Magistrate defined.
 - 147. Who are magistrates.

§ 145. Information defined.—The information is the allegation made to a magistrate that a person has been guilty of some designated crime.

See *Hewitt v. Newburger*, 66 Hun, 232; *People v. Johnson*, 46 Hun, 671; *People v. Noah*, 24 State Rep. 375.

A person arrested after the filing of the coroner's inquisition is entitled to a hearing before a magistrate as though arrested on an ordinary information. *Matter of Ramacar*, 63 How. 255; 10 Abb. N. C. 442; 1 N. Y. Cr. Rep. 36. But see *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 172.

§ 146. Magistrate defined.—A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a crime.

§ 147. Who are magistrates.—The following persons are magistrates:

1. The justices of the supreme court;
2. The judges of any city court;
3. The county judges and special county judges;
4. The city judge of the city of New York and the judges of the court of general sessions in the city and county of New York;
5. The justices of the peace;
6. The police and other special justices, appointed or elected in a city, village or town;
7. The mayors and recorders of cities. But in the city of New York, the only magistrates authorized to commit children to institutions, are the justices of the supreme court, the recorder, the city judge of the city of New York, and judges authorized to hold the court of general sessions, and the police justices.

Amended 1892, chap. 279; in effect Sept. 1, 1892.

See *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 172; *People v. Nowak*, 24 State Rep. 275; *People v. Bates*, 38 Hun, 181; 4 N. Y. Cr. Rep. 215; *Matter of McFurland*, 59 Hun, 306.

CHAPTER II.

THE WARRANT OF ARREST.

SECTION 148. Examination of the prosecutor and his witnesses, upon the information.

149. Depositions, what to contain.

150. In what case warrant of arrest may be issued.

151. Form of the warrant.

152. Name or description of the defendant, in the warrant and statement of the offense.

153. Warrant to be directed to and executed by a peace officer.

154. Who are peace officers.

SECTION 155. Warrant issued by certain judges.

156. Warrant issued by other magistrates.

157. Indorsement on the warrant, for service in another county, how and upon what proof to be made.

158. Defendant, arrested for felony.

159. Defendant, arrested for a misdemeanor.

160. Proceedings on taking bail from the defendant, in such case.

161. Proceedings, where he is admitted to bail in such case, but bail is not given.

162. Prisoner carried from county to city.

163. Power and privilege of officer.

164. When magistrate issuing the warrant is unable to act.

165. Defendant in all cases to be taken before a magistrate, without delay.

166. Defendant, before another magistrate than the one who issued the warrant.

§ 148. **Examination of the prosecutor and his witnesses, upon the information.** — When an information is laid before a magistrate, of the commission of a crime, he must examine on oath the informant and prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

See *Tracy v. Seamans*, 7 State Rep. 145; *People v. Nowak*, 24 id. 275.

The law does not require the information to be reduced to writing previously to issuing the warrant. *Payne v. Barnes*, 5 Barb. 465; *Ex parte Boswell*, 34 How. 347.

The omission of the magistrate to reduce the complaint to writing does not make the prosecutor a trespasser. *Sleight v. Ogle*, 4 E. D. Smith, 445.

The complaint need not be on oath, but the examination of complainant must be on oath. *Ex parte Boswell*, 34 How. 347.

A magistrate has no authority to order a person accused of a criminal offense to be committed until a subsequent day for examination without having first the accused brought before him. *Pratt v. Hill*, 16 Barb. 308.

Where the complaint is made on information the magistrate has power to issue subpoenas for witnesses. *People v. Hicks*, 15 Barb. 158.

The same strictness is not required in an information as on an indictment. *People v. Robertson*, 3 Wheel. C. C. 180.

The original information and depositions taken before the warrant was issued, however formerly drawn up, are not in themselves evidence against the accused at the trial. *People v. Restell*, 3 Hill, 290.

A written complaint made before a magistrate alleging that certain goods had been stolen, and that the complainant has probable cause to suspect and does suspect that A. stole them, is insufficient to justify the issuing a warrant for the arrest of the accused. *Blodgett v. Race*, 18 Hun, 132.

The omission of complainant or his witnesses to sign the deposition as required by this section is an irregularity, which will be held to be waived un-

less defendant has interposed the objection at the first available opportunity *People v. Winness*, 3 N. Y. Cr. Rep. 89; citing *Pierson v. People*, 79 N. Y. 424.

Section 809, Penal Code of California, authorizes a proceeding by information only where a defendant has been examined and committed as provided in section 373 of the Penal Code. *Held*, that where prisoner has been committed by the magistrate upon the oral testimony of the witnesses, and without reducing them to writing (as required by the section referred to), that an information against him was rightly dismissed and constituted no bar to another information. *Kallock v. Superior Ct.*, 56 Cal. 229.

§ 149. Depositions, what to contain.—The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant.

See *Loomis v. Reader*, 41 Hun, 269; *Tracy v. Seamans*, 7 State Rep. 145; *People v. Pratt*, 22 Hun, 300.

The depositions must set forth the facts tending to establish the crime (perjury), and not merely the conclusion of the witnesses. *Matter of Rothacker*, 11 Abb. N. C. 122.

The deposition may be upon information and belief where the acts and circumstances on which such information and belief are founded are given. *People v. McIntosh*, 5 N. Y. Cr. Rep. 38.

§ 150. In what case warrant of arrest may be issued.—If the magistrate be satisfied therefrom, that the crime complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

See *People v. McIntosh*, 5 N. Y. Cr. Rep. 40; *Fraser v. Board, etc.*, 17 State Rep. 875; *Tracy v. Seamans*, 7 id. 145; *Killoran v. Barton*, 26 Hun, 648.

It is enough when a magistrate is reasonably certain that a crime has been committed. *Pratt v. Bogardus*, 49 Barb. 89; *Abbott v. Booth*, 50 id. 551.

Not necessary that, in a criminal warrant, to set out the circumstances of the offense. *Atchinson v. Spencer*, 9 Wend. 62.

Just grounds of suspicion sufficient. *Samuel v. Payne*, Doug. 359; *Halley v. Mir*, 3 Wend. 350; *Cowles v. Dunham*, 2 C. & P. 565.

A justice of the peace, before he is authorized to issue a warrant for the arrest of a person, must be satisfied, by examination upon oath of the complainant, that a crime has been committed. *Wilkinson v. Robinson*, 6 How. 110.

A justice has jurisdiction to issue a warrant of arrest though he abuse it grossly. *Campbell v. Ewalt*, 7 How. 399; *Stewart v. Hawley*, 21 Wend. 553.

§ 151. Form of the warrant.—A warrant of arrest is an order in writing in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form, the blanks being properly filled:

"COUNTY OF

"In the name of the people of the State of New York, to any peace officer in the _____ :

"Information, upon oath, having been this day laid before me that the crime of _____ has been committed and accusing thereof,

"You are therefore commanded forthwith to arrest the above-named _____, and bring him before _____, at

"Dated at _____, this _____ day of _____, 18

.....

"Justice of the Peace."

The warrant must direct that the defendant be brought before the magistrate issuing the warrant, or if the offence was committed in another town, and is one of which a court of special sessions has jurisdiction to try, or which a magistrate has jurisdiction to hear and determine, before a magistrate of the town in which the offense was committed.

In effect as amended, Sept. 1, 1893; Laws 1893, ch. 458.

See *Killoran v. Barton*, 26 Hun, 648; *People v. Johnson*, 46 id. 671; *Fraser v. Board, etc.*, 17 State Rep. 875; *People v. Mead*, 92 N. Y. 420.

A warrant stating that "information upon oath having been this day laid before me that the crime of malicious trespass upon lands owned or occupied by * * * has been committed, and accusing * * * thereof," is sufficient in form. It is not necessary to set out the circumstances of the offense. *People v. Upton*, 29 State Rep. 778.

§ 152. Name or description of the defendant, in the warrant and statement of the offense. — The warrant must specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state an offense in respect to which the magistrate has authority to issue the warrant, and the time of issuing it, and the city, town or village where it is issued, and be signed by the magistrate with his name of office

See *People v. Beatty*, 39 Hun, 477; 4 N. Y. Cr. Rep. 288.

Not necessary in a criminal warrant to set out the circumstances of the offense. *Atchinson v. Spencer*, 9 Wend. 62; *People v. Upton*, 29 State Rep. 778.

It is sufficient if a criminal warrant indicate with reasonable certainty the offense sought to be charged. *Pratt v. Bogardus*, 49 Barb. 87.

Requisites of a criminal warrant as to time, place and the description of the offense. *Blythe v. Tompkins*, 2 Abb. 468.

Warrant for larceny good though it omit to state the value of the property stolen. *Payne v. Barnes*, 5 Barb. 465.

A warrant reciting a complaint against John R. Miller for a felony, and commanding the officer to arrest the said William Miller, is no justification for the arrest of John R. Miller, though the person intended. *Miller v. Foley*, 28 Barb. 630.

A misnomer of a person in a process on which an arrest is made, subjects the actors to an action for false imprisonment. *Scall v. Ely*, 4 Wend. 552.

In a criminal proceeding a warrant at common law must be under seal. *Beekman v. Traver*, 20 Wend. 77; *People v. Holcomb*, 3 Park. 656; *Smith v. Randall*, 3 Hill, 495.

Warrants of arrest need not contain the facts on which the charge is predicated, but are sufficient if the nature of the offense be clearly specified. *People v. McLeod*, 1 Hill, 377.

An omission in a warrant of arrest which is merely clerical "and which does not mislead any one," will not render such warrant invalid. *Payne v. Barnes*, 5 Barb. 465.

§ 153. Warrant to be directed to and executed by a peace officer.—The warrant must be directed to, and executed by, a peace officer.

Warrant not directed to the proper officer is void. *Russell v. Hubbard*, 6 Barb. 654.

A warrant legally issued can only be directed to an officer of the county in which the justice of the peace who issued it was a magistrate. *People v. Shaver*, 4 Park. 45.

Where a warrant is issued, directed to the sheriff or any constable of the county, the justice cannot, by indorsement thereon, authorize a private person to make the arrest; the warrant itself must be directed to the person by whom the arrest is made, or it is no protection. *Abbott v. Booth*, 51 Barb. 546.

§ 154. Who are peace officers.—A peace officer is a sheriff of a county, or his under-sheriff or deputy, or a constable, marshal, police constable or policeman of a city, town or village.

§ 155. Warrant issued by certain judges.—If the warrant be issued by a judge of the supreme court, or of the superior court, or court of common pleas, recorder, city judge or judge of a court of general sessions in the city and county of New York, or by a county judge, or by the recorder of a city where jurisdiction is conferred by law upon such recorder, or by a judge of the city court, it may be directed generally to any peace officer in the state, and may be executed by any of those officers to whom it may be delivered.

In effect, as amended, Sept. 1, 1898; Laws 1898, ch. 462.

See *Moak v. De Forest*, 5 Hill, 607.

§ 156. Warrant by other magistrates.—If it be issued by any other magistrate, it may be directed generally to any peace officer in the county in which it is issued, and may be executed in that

county; or if the defendant be in another county, it may be executed therein, upon the written direction of a magistrate of such other county indorsed upon the warrant, signed by him with his name of office, and dated at the city, town or village where it is made, to the following effect: "This warrant may be executed in the county of Monroe," [or as the case may be.]

A justice of the peace, for a misdemeanor committed within his view, cannot pursue the offender and arrest him outside the justice's jurisdiction. *Butolph v. Blust*, 5 Lans. 84; 4 How. Pr. 481.

Where a person arrested by virtue of a criminal warrant, indorsed pursuant to statute, is discharged from arrest by a justice of the peace of the county where he is arrested, on giving a recognizance, the warrant has spent itself, and the officer has no right to arrest the prisoner again without new process. *Doyle v. Russell*, 30 Barb. 300.

A justice of the peace has no power to issue process of arrest for a crime committed in another county, though the offender be in the county where the justice resides. *People v. Cassels*, 5 Hill, 167; id. 607.

A person arrested by virtue of a warrant, indorsed pursuant to statute, for an offense punishable by imprisonment in the state prison, cannot be let to bail in the county where the arrest is made, but must be taken to the county in which the warrant was issued. *Clark v. Cleveland*, 6 Hill, 344. See *People v. Clews*, 77 N. Y. 89; also, *Garlone's Case*, 10 Abb. 182; *People, ex rel., v. Chapman*, 30 How. 202.

Where an offender arrested under a warrant, indorsed in pursuance of the act "for the better apprehending of felons," etc., was taken to the county where the magistrate resided who issued the warrant, he not being a justice of the county where the offense was committed, it was held that the action for false imprisonment was properly brought, he not having complied with the requirements of the statute. *Green v. Rumsey*, 2 Wend. 611.

§ 157. Indorsement on the warrant, for service in another county, how and upon what proof to be made. — The indorsement mentioned in the last section cannot, however, be made, unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon this proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterward appear that the warrant was illegally or improperly issued.

See cases cited under last section.

§ 158. Defendant, arrested for felony. — If the crime charged in the warrant be a felony the officer making the arrest must take the defendant before the magistrate who issued the

warrant, or some other magistrate in the same county, as provided in section 164.

See *People v. Frink*, 41 Hun, 193; *Fraser v. Board, etc.*, 17 State Rep. 778; *People v. Navagh*, 4 N. Y. Cr. Rep. 297.

If the offense charged in the warrant be punishable with death or imprisonment in a state's prison, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, etc. *People v. Chapman*, 30 How. 202; *People v. Clews*, 77 N. Y. 39; and cases cited under section 156, *ante*.

§ 159. Defendant, arrested for a misdemeanor. — If the crime charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, for his appearance before the magistrate named in the warrant, and take bail from him accordingly.

If the offense charged in the warrant be not punishable by death or by imprisonment in a state's prison, the prisoner may let to bail by a magistrate of the county in which he is arrested. *People v. Chapman*, 30 How. 202; *People v. Clews*, 77 N. Y. 39.

§ 160. Proceedings on taking bail from the defendant in such case. — On taking bail the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and, without delay, deliver the warrant and undertaking to the magistrate before whom the defendant is required to appear.

§ 161. Proceedings, where he is admitted to bail in such case, but bail is not given. — If, on the admission of the defendant to bail, as provided in section one hundred and fifty-nine, bail be not forthwith given, the officer must take the defendant before a magistrate as directed by the warrant, or some other magistrate in the same town or county, as provided in section one hundred and sixty-four.

In effect, as amended, Sept. 1, 1893; Laws 1893, ch. 458.

See *Fraser v. Board, etc.*, 17 State Rep. 875.

§ 162. Prisoner carried from county to city. — An officer who has arrested a defendant on a criminal charge, in any county, may carry such prisoner through such parts of any

county or counties as shall be in the ordinary route of travel from the place where the prisoner shall have been arrested, to the place where he is to be conveyed and delivered under the process by which the arrest shall have been made; and such conveyance shall not be deemed an escape.

A prisoner in custody and passing through a county not liable to arrest on civil process. *Love v. Humphrey*, 9 Wend. 204.

§ 163. Power and privilege of officer.—While passing through such other county or counties the officers having the prisoner in their charge shall not be liable to arrest on civil process; and they shall have the like power to require any citizen to aid in securing such prisoner, and to retake him if he escapes, as if they were in their own county; and a refusal or neglect to render such aid shall be an offense, in the same manner as if they were officers of the county where such aid shall be required.

§ 164. When magistrate issuing the warrant is unable to act.—When, by the preceding sections of this chapter, the defendant is required to be taken before the magistrate who issued the warrant, or before a magistrate of the town in which the offense was committed, he may, if that magistrate be absent or unable to act, be taken before the nearest or most accessible magistrate in the town in which the magistrate before whom the warrant is returnable resides, if there be such a magistrate accessible and qualified to act, and otherwise, before the nearest or most accessible magistrate in the same county. The officer must, at the same time, deliver to the magistrate the warrant, with his return indorsed and subscribed by him.

In effect, as amended, Sept. 1, 1893; Laws 1893, ch. 458.

See *People v. Frink*, 41 Hun, 193; *People v. Navagh*, 4 N. Y. Cr. Rep. 297; *Fraser v. Board etc.*, 17 State Rep. 875.

Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant, or if he be absent or his office be vacant, before the nearest magistrate in the same county. *People v. Chapman*, 30 How. 202; *People v. Clews*, 77 N. Y. 39.

§ 165. Defendant in all cases to be taken before a magistrate without delay.—The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

A magistrate cannot commit a prisoner under arrest for a future hearing until he has been brought before him. *Pratt v. Hill*, 16 Barb. 303.

A justice of the peace issued a warrant on Saturday on a criminal complaint, and on it indorsed a direction to the constable to commit the parties until next Monday for examination, and the constable committed them and held them accordingly. *Held*, that both officers were trespassers. The party arrested

must be forthwith taken before a magistrate. *Pratt v. Hill*, 16 Barb. 303; *Hawley v. Butler*, 48 Barb. 101.

The officer may detain the defendant a reasonable time to find a magistrate. *Arnold v. Steeves*, 10 Wend. 514, 515.

May be held on a justice's warrant not exceeding twelve hours. *Id.* -

§ 166. Defendant, before another magistrate than the one who issued the warrant.—If the defendant be taken before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

CHAPTER III.

ARREST BY AN OFFICER, UNDER A WARRANT.

SECTION 167. Arrest defined.

168. By whom an arrest may be made.

169. Every person bound to aid an officer in an arrest.

170. When the arrest may be made.

171. How an arrest is made.

172. No further restraint allowed than is necessary.

173. Officer must state his authority, and show warrant, if required.

174. If defendant flee or resist, officer may use all necessary means to effect arrest.

175, 176. When an officer may break open a door or window.

§ 167. Arrest defined. Arrest is the taking of a person into custody that he may be held to answer for a crime.

See 4 Alb. L. J. 196; 1 Bish. Crim. Proc. (8d ed.), § 156; 1 Wheeler Crim. Cas. 104, note; *Searls v. Viets*, 2 Thomp. & Cook, 226.

§ 168. By whom an arrest may be made.—An arrest may be:

1. By a peace officer, under a warrant;
2. By a peace officer, without a warrant; or
3. By a private person.

§ 169. Every person bound to aid an officer in an arrest. — Every person must aid an officer in the execution of a

warrant, if the officer require his aid and be present and acting in its execution.

See *Coyles v. Hurtin*, 10 Johns. 85; *Elder v. Morrison*, 10 Wend. 137.

§ 170. When the arrest may be made. — If the crime charged be a felony, the arrest may be made on any day, and at any time of the day or during any night. If it be a misdemeanor, the arrest cannot be made on Sunday, or at night, unless by direction of the magistrate indorsed upon the warrant.

In *Murphy v. Koon*, 20 Abb. N. C. 259; 8 N. Y. State Rep. 230, the action was brought to recover damages for an alleged assault and battery and false imprisonment. A warrant was issued by a police justice, commanding the apprehension of this plaintiff on the charge of larceny, to-wit: the stealing of a dog of the value of ten dollars. The warrant was handed to one of the defendants, who took with him the other, at about three o'clock in the morning, and went to the plaintiff's residence, and, after rapping, gained admission, entered the house, and arrested the plaintiff. There was no authority to arrest in the night-time indorsed upon the warrant. *Held*, that the defendants were not justified in making the arrest at the time they did, and that the court properly charged that there was a false imprisonment as soon as the defendants took the plaintiff into custody.

§ 171. How an arrest is made. — An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.

See *Gold ads. Bissell*, 1 Wend. 210; *Rapalje's Crim. Proc.*, § 10.

§ 172. No further restraint allowed than is necessary. — The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention.

§ 173. Officer must state his authority, and show warrant, if required. — The defendant must be informed by the officer that he acts under the authority of the warrant, and he must also show the warrant, if required.

See 4 Alb. L. J. 85, 149.

In *People v. Shanley*, 40 Hun, 478, defendant was indicted and convicted of an assault in the second degree for having resisted one K., a police officer who attempted to arrest him for a misdemeanor, not committed in the officer's presence. A warrant had been issued and was at the time in the office of the chief of police, but not in the actual possession of the police officer. The defendant knew that K. was a police officer and had heard that the warrant had been issued.

The court charged that the warrant was in the constructive possession of the officer, and declined to charge that it was the duty of the officer to disclose to the defendant his authority and the process under which he arrested him. *Held*, error; that the language of section 173 of the Code of Criminal Procedure, regulating arrests by officers under warrant, required the officer to have the warrant in his actual possession, ready to be shown to the defendant if required. Learned, P. J., said: "On common-law principles, aside from statute, this same doctrine is laid down in *Codd v. Cobe*, 1 Exch. Div. 352, which followed *Galliard v. Laxton*, 2 Best & Smith, 363. The former of those cases was almost exactly like the present. A warrant had been issued against Codd and placed in the hands of one constable. Another constable, not being in the possession of the warrant, arrested him. Codd did not demand to see the warrant, resisted the arrest and greatly injured the officer. For this resistance and assault Codd was convicted. The conviction was reversed by the three judges of the court of appeals, Bramwell, Mellor and Denman, and they stated that they had the concurrence of other judges whom they had consulted. Their decision is directly in point and shows the present view in England of the common law. The other case was similar. If the remark in *Arnold v. Steves*, 10 Wend. 515, was correct, that an officer is not bound to show his warrant, which remark is followed (with a *semble*) in *Bellows v. Shannon*, 2 Hill, 86, certainly that rule is changed by section 173, above cited. So that argument derived from those cases is of no weight. The same may be said of the remarks in 1 Bishop's Criminal Procedure, §§ 191, 192. The Code has declared that the officer must show his warrant if requested. And it follows inevitably that he must have it with him." See 51 N. J. L. 189; 81 Cent. L. J. 499.

§ 174. If defendant flee or resist, officer may use all necessary means to effect arrest. — If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

If a felony has actually been committed, an officer, in arresting the offender or preventing his escape, will be justified in taking his life, providing there is an absolute necessity for so doing. It is otherwise in case of an arrest for misdemeanor. *Conraddy v. People*, 5 Park. 237; *Rey v. Murphy*, 1 Crawl. & Dix C. C. 20; *Gardiner v. Thebodeau*, 14 La. Ann. 732; *State v. O'Neil*, 1 Houst. Crim. Cas. 468.

All force necessary may be employed by an officer alike in a felony and misdemeanor in making an arrest. *Mesoner v. Comr.*, 26 Gratt. 976; *Brooks v. Comr.*, 61 Penn. St. 352; *Golden v. State*, 1 So. Car. 292; *Burdett v. Coleman*, 14 East, 163, 190.

§ 175. When officer may break open a door or window. — The officer may break open an outer or inner door or window of any building, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

See § 178, *post*; 2 Hawk. P. C., chap. 14, §§ 3-7; 5 City Hall Rec. 141; 2 Alb. L. J. 303; *Bell v. Clapp*, 10 Johns. 265.

§ 176. When officer may break open a door or window. — An officer may break open an outer or inner door or window of any building, for the purpose of liberating a person, who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation.

If the officer, having lawfully entered the house through an open outer door, is locked in by inmates, he may break out or be rescued by his associates breaking in. 1 Bish. Crim. Proc., § 202; *White v. Wiltshire*, Cro. Jac. 555; 1 Chit. Crim. Law, 58; 2 Hawk. P. C., chap. 14, § 11; 1 Hale P. C. 459.

CHAPTER IV.

ARREST BY AN OFFICER WITHOUT A WARRANT.

SECTION 177. In what cases allowed.

178. May break open a door or window, if admittance refused.

179. May arrest at night, on reasonable suspicion of felony.

180. Must state his authority, and cause of arrest, except where party is committing felony or is pursued after escape.

181. May take before a magistrate, a person arrested by a bystander for breach of the peace.

182. Magistrate may commit by verbal or written order, for offenses committed in his presence.

§ 177. In what cases allowed. — A peace officer may, without a warrant, arrest a person :

1. For a crime, committed or attempted in his presence ;
2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.

The English cases in regard to arrests without warrant are collected and elaborately reviewed by Mr. Greaves, the well-known editor of Russell on Crimes, published in Cox & Saunders' Criminal Acts (3d ed.), LXI, entitled "The Law of Arrest without Warrants."

See, also, 18 Eng. Rep. 360; 11 Cent. L. J. 321; 8 Crim. Law Mag. 12; 4 id. 193; *Price v. Seeley*, 10 Clark & Finnelly, 28; 1 Bennett & Heard's Lead. Crim. Cas. 2d ed.) 117, and notes 183-193, 197-202; id. 220, note; Burn's Justice, tit. "Arrest"; 1 Alb. L. J. 28, 86, 149; Hurd Habeas Corpus (1st ed.), 403, 395 (2d ed.); 1 Bish. Crim. Proc. (2d ed.), §§ 164, 173, 181, 186; 3 Whart. Crim. Law (7th ed.), §§ 2927-2935; 1 Russell Crimes (5th Eng. ed.), 709-730; id. (7th Am. ed.), 255-9; 3 Wait's Actions and Defenses, 311.

Questions as to the right to arrest without warrant arise in four classes of cases:

1. Where such arrests are made by a constable or other peace officer on a charge of felony.
2. Where such arrests are made by a private citizen.
3. Where such arrests are made by a constable or peace officer on a charge of misdemeanor.
4. Where such arrests are made by a private citizen.

In *Way's Case*, 41 Mich. 804, Mr. Justice Campbell, speaking upon the subject of arrest without warrant, says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in those cases where the public security requires it, and this has only been recognized in felony and in breaches of the peace committed in presence of the officer. *Quinn v. Heisel*, 40 Mich. 576, and *Drennan v. People*, 10 id. 169."

Where an arrest is made by a constable or other peace officer on a charge for a felony committed in his presence, without a warrant, the general rule is that he may arrest any person so committing such offense.

ILLINOIS: *Miles v. Weston*, 60 Ill. 361.

NEW YORK: *Willis v. Warren*, 17 How. Pr. 100; 1 Hilt. 590.

A peace officer may arrest without warrant for a misdemeanor committed in his presence, if he acts promptly. Five hours' delay without cause takes away his authority to do so. *Wahl v. Walton*, 30 Minn. 506.

Where an arrest is made by a constable or other peace officer on a charge of a past felony, without a warrant, the general rule is, that he has a right at common law, without a warrant, to arrest any one whom he suspects to be guilty of felony, whether he acts upon his own knowledge or upon facts communicated by others.

CALIFORNIA: *People v. Pool*, 27 Cal. 572.

CANADA (UPPER): *Rogers v. Van Valkenburgh*, 20 Q. B. 218; *Cottrell v. Huerton*, 7 C. P. 277.

CONNECTICUT: *Knot v. Gay*, 1 Root, 66.

DELAWARE: *State v. List*, 1 Houst. Crim. Cas. 133.

ENGLAND: *Goeden v. Elphick*, 4 Exch. 445; 8 N. Y. Leg. Obs. 204.

ILLINOIS: *Shandley v. Wells*, 71 Ill. 78.

INDIANA: *Doering v. State*, 49 Ind. 50; 19 Am. Rep. 669, 672, note.

KENTUCKY: *Jamison v. Gaernett*, 10 Bush, 231.

MAINE: *Burke v. Bell*, 36 Me. 317.

MASSACHUSETTS: *Rohan v. Sawin*, 5 Cush. 281; *Com. v. Carey*, 12 id. 246; *Com. v. McLaughlin*, id. 615.

MICHIGAN: *Drennan v. People*, 10 Mich. 169.

NEW YORK: *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702, 705, note; *Matter of Henry*, 29 How. Pr. 187; *Slater v. Wood*, 9 Bosw. 15, 26; *Burns v. Erben*, 40 N. Y. 463; affirming 1 Rob. 555; 26 How. 278; *Wilson v. King*, 39 N. Y. Super. 384; *Carpenter v. Mills*, 29 How. Pr. 473; *Taylor v. Strong*, 3 Wend. 463; *Brown v. Chadsey*, 39 Barb. 253; *Hawley v. Butler*, 54 id. 490; 48 id. 101; *McIntyre v. Radema*, 46 N. Y. Super. Ct. 123.

Though he has a void warrant. *Miller v. Foley*, 28 Barb. 630; 2 Wait's Pr. 44.

NORTH CAROLINA: *Neal v. Joyner*, 89 N. C. 290.

RHODE ISLAND: *Wade v. Chaffee*, 8 R. I. 224; 5 Am. Rep. 572, 574, note.

Where an arrest is made by a constable or other peace officer without warrant, on a charge for a misdemeanor committed in his presence, or just terminated, involving a breach of the peace, the general rule is that he may arrest for a misdemeanor involving an affray or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal: *Price v. Seeley*, 10 Clark & Fin., 28; *Hennessy v. Conolly*, 13 Hun, 173; 6 N. Y. Weekly Dig. 83; although the cases are quite conflicting as to whether he may not arrest for any misdemeanor, whether it involve a breach of the peace or not, and the practitioner should examine the cases in his own state.

CONNECTICUT: *Knot v. Gay*, 1 Root, 66.

DELAWARE: *State v. Russell*, 1 Houst. Crim. Cas. 122.

ENGLAND: *Hanway v. Boulbee*, 1 Moody & Rob. 15; *Regina v. Light, Dears. & B. C. C. 832*; *Timothy v. Simpson*, 1 Cr., Mees. & Rosc. 757, and note, p. 765, Johnson & Co's. ed.

ILLINOIS: *Newton v. Locklin*, 77 Ill. 103; *Shanley v. Wells*, 71 id. 78; *Lancaster v. Lane*, 19 id. 242.

INDIANA: *Nealis v. Hayward*, 48 Ind. 19.

IRELAND: *Murphy v. McClelland*, Irish L. R., 5 C. L. 440.

MASSACHUSETTS: *Com. v. Tobin*, 108 Mass. 426; 17 Am. Rep. 375.

MICHIGAN: An insane person. *Lott v. Sweet*, 33 Mich. 308; *Quinn v. Heisel*, 40 id. 576.

NEW HAMPSHIRE: *Forriet v. Leavitt*, 52 N. H. 481.

NEW YORK: *Hennessy v. Conolly*, 13 Hun, 173; *Coyles v. Hurtin*, 10 Johns. 85; *Phillips v. Trull*, 11 id. 436; *Butolph v. Blust*, 41 How. Pr. 481; 5 Lans. 84; *McIntyre v. Radnus*, 46 N. Y. Super. 123; *Carpenter v. Mills*, 29 How. 473; *Stage Horse Cases*, 15 Abb. Pr. (N. S.) 51, 61; *Willis v. Warren*, 17 How. 100; 1 Hilt. 590; *Meyer v. Clark*, 41 N. Y. Super. 107, 118; *Sternack v. Brooks*, 7 Daly, 142; *Boyleston v. Kerr*, 2 id. 220.

See *Sands v. Benedict*, 2 Hun, 479; 5 Thomp. & Cooke, 19.

NORTH CAROLINA: *State v. Belk*, 76 N. C. 12; *State v. Freeman*, 86 id. 683.

PENNSYLVANIA: *Com. v. Fisher*, 1 Leg. Gazette, 50; *Com. v. Deacon*, 8 Serg. & Rawle, 47.

Where an arrest is made by a constable or other peace officer without a warrant, on a charge of past misdemeanor, the general rule is that he cannot at common law arrest for such an offense after it has been committed.

2 Hawk. P. C., chap. 13; 1 Chit. Crim. Law, 20; 1 Bish. Crim. Proc. (3d ed.) 181; 7 Am. & Eng. Encyc. of Law, 675; 1 id. 734; 1 Dill. Mun. Corp. (3d ed.), § 210; 12 Cr. L. Mag. 422.

DELAWARE: *State v. Crocker*, 1 Houst. Crim. Cas. 484.

ENGLAND: *Regina v. Walker*, 6 Cox Crim. Cas. 571; *Dears. C. C. 358*; *Price v. Seeley*, 10 Clark & Finnelly, 28.

GEORGIA: See *Johnson v. State*, 30 Ga. 436.

ILLINOIS: *Rafferty v. People*, 69 Ill. 111; 18 Am. Rep. 601; *Shanley v. Wells*, 71 Ill. 78, 82; *Main v. McCarty*, 15 id. 441.

IRELAND: *Forbes v. Lloyd*, Irish L. Rep., 10 C. L. 552.

KANSAS: See *Prell v. McDonald*, 7 Kans. 426.

MASSACHUSETTS: *Com. v. Carey*, 12 Cush. 246; *Com. v. McLaughlin*, id. 615; *Scott v. Eldridge*, 27 N. E. Rep'r, 677.

NEW JERSEY: *Webb v. State*, 51 N. J. L. 189.

In *Pinkerton v. Verberg*, 78 Mich. 573; 18 Am. St. Rep. 573, it was held that the fact that a woman has the reputation of being a street-walker, and that the officer knows of her reputation, and believes her to be plying her vocation, does not justify his arresting her without a warrant while she is walking along the street, doing nothing to indicate such a purpose.

NEW YORK: *People v. Shanley*, 40 Hun, 478; *Phillips v. Trull*, 11 Johns. 486; *Meyer v. Clark*, 41 N. Y. Super. 107; *People v. Adler*, 3 Park. 249; *Mainers v. Constantine*, 21 Daily Reg. No. 123.

In *People v. Pratt*, 22 Hun, 300, it was held that an officer had no authority to arrest, without warrant, a common prostitute, unless disorderly conduct is committed in his presence.

A common prostitute, when sitting at a window, soliciting men from the street for immoral purposes, may be arrested by officer without warrant. *Harft v. McDonald*, 1 City Ct. Rep. 181. See *Hawley v. Butler*, 54 Barb. 490; 48 id. 101; *Sands v. Benedict*, 5 Thomp. & Cook, 19.

NORTH CAROLINA: *State v. Belk*, 76 N. C. 12.

OHIO: See, under *statute*, *Wolf v. State*, 19 Ohio St. 248, 257.

§ 178. May break open a door or window, if admittance refused. — To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

See § 175, *ante*.

§ 179. May arrest at night, on reasonable suspicion of felony. — He may also, at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony had been committed, but that the person arrested did not commit it.

See *People v. Ryan*, 28 State Rep. 490.

§ 180. Must state his authority, and cause of arrest, except where party is committing felony or is pursued after escape. — When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.

§ 181. **May take before a magistrate a person arrested by a bystander for breach of the peace.**—A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

§ 182. **Magistrate may commit by verbal or written order, for offenses committed in his presence.**—When a crime is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

See *Furrell v. Warren*, 3 Wend. 258; *Butolph v. Blust*, 5 Lans. 84; 41 How. 481; *Sands v. Benedict*, 2 Hun. 479; *Parsons v. Brainard*, 17 Wend. 522; *Lindsay v. People*, 67 Barb. 550.

CHAPTER V.

ARREST BY A PRIVATE PERSON.

SECTION 183. In what cases allowed.

184. Must inform the party of the cause of arrest, except when actually committing the offense or on pursuit after escape.

185. Must immediately take prisoner before a magistrate, or deliver him to a peace officer.

§ 183. **In what cases allowed.**—A private person may arrest another :

1. For a crime committed or attempted in his presence ;
2. When the person arrested has committed a felony, although not in his presence.

Subdiv. 1. See *Phillips v. Trull*, 11 Johns. 487; *People v. Woleen*, 7 N. Y. Leg. Obs. 89; *Keenan v. State*, 8 Wisc. 132; *Long v. State*, 12 Ga. 293; *Price v. Seeley*, 10 Clark & Finnelly, 28; *Judson v. Reardon*, 16 Minn. 491; *People v. Morehouse*, 6 N. Y. Supp. 763; 25 State Rep. 294.

Subdiv. 2. Where an arrest is made by a private citizen without warrant, on a charge of a past felony, the general rule is that two things must concur which the party arresting must prove at his peril:

- (a) A felony must have been committed by some person.
- (b) Such private person must have had reasonable cause to believe the party arrested to be the guilty person.

ALABAMA: *Morrell v. Quarles*, 35 Ala. 544.

CANADA (UPPER): *Rogers v. Van Valkenburgh*, 20 Q. B. 220; *McKenzie v. Gibson*, 8 id. 100; *Ashley v. Dundas*, 5 K. B. (O. S.) 749; *Patterson v. Scott*, 38 Q. B. 642.

CONNECTICUT: *Wreaford v. Smith*, 2 Root, 171.

ENGLAND: *Lister v. Perryman*, L. R., 4 H. L. 521; reversing L. R., 3 Exch. 197.

GEORGIA: *Habersham v. State*, 56 Ga. 61; *Long v. State*, 12 id. 293.

ILLINOIS: *Dodds v. Board*, 43 Ill. 95; *Marsh v. Smith*, 49 id. 396; *Smith v. Donnelly*, 66 id. 464.

INDIANA: See *Doering v. State*, 49 Ind. 56.

NEW JERSEY: *Reuck v. McGregor*, 32 N. J. Law, 70; *Spencer v. Anness*, id. 100.

See *Schroder v. Ehlers*, 31 N. J. Law, 44.

NEW YORK: *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702, 705, note; *Burns v. Erben*, 40 N. Y. 463; *People v. Adler*, 3 Park. 249; *Brown v. Chadsey*, 39 Barb. 253; *Hawley v. Butler*, 54 id. 490; 48 id. 101.

NORTH CAROLINA: *State v. Bryant*, 65 N. C. 327.

PENNSYLVANIA: *Wakeley v. Hart*, 6 Binn. 316.

Where an arrest is made by a private citizen without warrant, on a charge of a past misdemeanor, the general rule is he has no right to do so.

ILLINOIS: See *Smith v. Donnelly*, 66 Ill. 464.

INDIANA: *Doering v. State*, 49 Ind. 56.

KENTUCKY: *Jamison v. Gaernett*, 10 Bush, 221.

NEW YORK: *People v. Adler*, 3 Park. 249.

§ 184. **Must inform the party of the cause of arrest, except when actually committing the offense or on pursuit after escape.**—A private person, before making an arrest, must inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission.

Notice of arrest must be given expressly or by implication. 27 Cal. 572; 76 N. C. 10; 9 Coke, 65; 1 Moody C. C. 207.

So a private person arresting another must notify him of his intention. 65 N. C. 327.

Not so, however, when party arrested was engaged in the commission of a crime. 27 Cal. 572.

§ 185. **Must immediately take prisoner before a magistrate, or deliver him to a peace officer.**—A private person, who has arrested another for the commission of a crime, must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer.

CHAPTER VI.

RETAKING, AFTER AN ESCAPE OR RESCUE.

SECTION 186. May be at any time, or in any place in the state.

187. May break open a door or window, if admittance refused.

§ 186. May be at any time, or in any place in the state. If a person arrested escape or be rescued, the person, from whose custody he escaped or was rescued, may immediately pursue and retake him, at any time, and in any place in the state.

See 1 Bish. Crim. Proc., § 163; *Cooper v. Adams*, 2 Blackf. 294; *Com. v. Sheriff*, 1 Grant (Penn.), 187.

§ 187. May break open a door or window, if admittance refused.—To retake the person escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open an outer or inner door or window of a building.

CHAPTER VII.

EXAMINATION OF THE CASE, AND DISCHARGE OF THE DEFENDANT OR HOLDING HIM TO ANSWER.

SECTION 188. Magistrate to inform defendant of the charge, and his right to counsel.

189. Time to send, and sending for counsel.

190. On appearance of counsel, or waiting for him a reasonable time examination to proceed.

191. When to be completed; adjournment.

192. On adjournment, defendant to be committed, or discharged on deposit of money.

193. Form of commitment.

194. Depositions, to be read on examination, and witnesses examined.

195. Examination of witnesses to be in presence of defendant, and witnesses to be cross-examined in his behalf.

196. Defendant to be informed of his right to make a statement.

197. Waiver of his right, and its effect.

198, 199. Statement, how taken.

200. How reduced to writing, and authenticated.

201. After statement or waiver, defendant's witnesses to be examined.

202. Witnesses to be kept apart.

203. Who may be present at examination.

204. Testimony, how taken and authenticated.

SECTION 205. Depositions and statement, how and by whom kept.

- 206. Defendant entitled to copies of depositions and statement.
- 207. Defendant, when and how to be discharged.
- 208. When and how to be committed.
- 209. Order for commitment.
- 210. Certificate of bail being taken.
- 211. Defendant to choose how he shall be tried.
- 212. Order for bail, on commitment.
- 213, 214. Form of commitment.
- 215. Undertaking of witnesses to appear, when and how taken.
- 216. Security for appearance of witness, when and how required.
- 217. Infants and married women may be required to give security for appearance as witnesses.
- 218. Witness to be committed, on refusal to give security for appearance.
- 219. Witness, unable to give security, may be conditionally examined.
- 220. Last section not applicable to prosecutor or accomplice.
- 221. Magistrate to return depositions, statement and undertakings of witnesses, to the court.

§ 188. Magistrate to inform defendant of the charge, and his right to counsel. — When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

See State Const., art. 1, § 6.

"Right to aid of counsel," see § 8, *ante*.

The provisions of this section are only applicable to proceedings prosecuted by indictment. *People v. Cook*, 45 Hun, 36.

In *People v. Mondon*, 103 N. Y. 221; 4 N. Y. Cr. Rep. 561; 34 Alb. L. J. 436, defendant was an Italian laborer, having an imperfect understanding of the English language. He was under arrest, without warrant, charged with murder. A coroner's inquest was being held. The prisoner was taken by the sheriff, in whose custody he was, and whose power he could not resist, before the coroner's inquest then engaged in an investigation against himself. He did not go there voluntarily. He was sworn by the coroner as a witness; was without counsel, and without means to employ counsel. He was not informed that he could not be compelled to be a witness against himself, nor that he need not give an answer which would tend to criminate himself. *Held*, that the prisoner's attendance before the coroner was compulsory, and the testimony taken was involuntary and inadmissible under the Constitution.

This case was distinguished in *People v. Chapleau*, 121 N. Y. ; 80 State Rep. 992.

A person against whom an inquisition has been found by a coroner's jury, whether arrested before or after the filing thereof, is entitled to a hearing be-

fore a magistrate in the same manner as if he had been arrested upon an ordinary information as defined by section 145. *Matter of Ramscar*, 68 How. Pr. 255.

In *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 172, it was held that sections 188-200, Code Crim. Proc., refer in terms only to the judicial examinations therein provided for, regularly instituted before one of the magistrates described in section 147 for the examination of criminals, and do not include a statement made after arrest to a coroner, not acting in an official capacity, but simply as a clerk to take down said statement.

§ 189. Time to send, and sending for counsel. — He must also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the town or city, as the defendant may name. The officer must, without delay and without fee, perform that duty.

See references under § 188, *ante*.

§ 190. On appearance of counsel, or waiting for him a reasonable time, examination to proceed. — The magistrate, immediately after the appearance of counsel, or if none appear and the defendant require the aid of counsel, must, after waiting a reasonable time therefor, proceed to examine the case, unless the defendant waives examination and elects to give bail, in which case the magistrate must admit the defendant to bail if the crime is bailable, as provided in section two hundred and ten; and in that case witnesses in attendance or shown to be material for the people may be required to appear and testify, or to be examined conditionally as prescribed in sections two hundred and fifteen, two hundred and sixteen, two hundred and seventeen, two hundred and eighteen, two hundred and nineteen and two hundred and twenty.

See references under § 188, *ante*.

§ 191. When to be completed; adjournment. — The examination must be completed at one session, unless the magistrate, for good cause shown, adjourn it. The adjournment cannot be for more than two days at each time, unless by consent or on motion of the defendant.

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Mendon*, 108 N. Y. 221; reversing 88 Hun, 191.

A magistrate has no authority to commit for a hearing on a subsequent day until the accused has been first brought before him. *Pratt v. Hill*, 16 Barb. 808.

A state magistrate may commit for a further hearing touching a crime against the United States. *Ex parte Smith*, 5 Cow. 273.

In a temporary commitment by a magistrate for further examination on a charge of larceny, not necessary to state whether grand or petit. *People v. Nash*, 5 Park. 473; 16 Abb. Pr. 281.

§ 192. On adjournment, defendant to be committed, or discharged on deposit of money. — If an adjournment be had for any cause, the magistrate must commit the defendant for examination, or discharge him from custody, upon his giving bail to appear during the examination, or upon the deposit of money as provided in this Code, to make sure of his appearance at the time to which the examination is adjourned.

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Mondon*, 108 N. Y. 221; reversing 38 Hun, 191.

§ 193. Form of commitment. — The commitment for examination is by an indorsement signed by the magistrate, on the warrant of arrest, to the following effect: "The within named A. B., having been brought before me under this warrant, is committed for examination, to the sheriff of the county of _____," or the city and county of New York, "to the keeper of the city prison of the city of New York."

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172.

§ 194. Depositions, to be read on examination, and witnesses examined. — At the examination, the magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information, and if the defendant request it, or elects to have the examination, must summon for cross-examination the witnesses so examined, if they be in the county. He must also issue subpoenas for additional witnesses required by the prosecutor or defendant.

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Mondon*, 38 Hun, 191; 108 N. Y. 221; *People v. Restell*, 8 Hill, 289; *Son v. People*, 12 Wend. 344.

§ 195. Examination of witnesses to be in presence of defendant, and witnesses to be cross-examined in his behalf. — The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Rostell*, 3 Hill, 289; *Bebee v. People*, 5 id. 83.

§ 196. **Defendant to be informed of his right to make a statement.** — When the examination of the witnesses on the part of the people is closed, the magistrate must inform the defendant, that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof); that the statement is designed to enable him, if he sees fit, to answer the charge and to explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial.

See *People v. McMahon*, 2 Park. 669, 670; *People v. Hendrickson*, 1 id. 416; *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Mondon*, 103 N. Y. 221; 4 N. Y. Cr. Rep. 561; *People v. Chapleau*, 30 State Rep. 992.

§ 197. **Waiver of his right and its effect.** — If the defendant waive his right to make a statement, the magistrate must make a note thereof, immediately following the depositions of the witnesses against the defendant.

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Mondon*, 38 Hun, 191.

§ 198. **Statement, how taken.** — If the defendant choose to make a statement, the magistrate must proceed to take it in writing, without oath, and must put to the defendant the following questions only:

What is your name and age?

Where were you born?

Where do you reside, and how long have you resided there?

What is your business or profession?

Give any explanation you may think proper, of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation.

See *Bellinger v. People*, 8 Wend. 595; *People v. Moore*, 15 id. 419; *Matter of Borwell*, 34 How. Pr. 347; *People v. McGloin*, 91 N. Y. 248; *People v. Mondon*, 103 id. 221; 4 N. Y. Cr. Rep. 561.

§ 199. **Statement, how taken.** — The answer of the defendant to each of the questions must be distinctly read to him as it is taken down. He may thereupon correct or add to his answer, and it must be corrected until it is made conformable to what he declares to be the truth.

See *People v. McGloin*, 91 N. Y. 248; 12 Abb. N. C. 172; *People v. Mondon*, 38 Hun, 191.

§ 200. How reduced to writing and authenticated. — The statement must be reduced to writing by the magistrate, or under his direction, and authenticated in the following manner:

1. The authentication must set forth, in detail, that the defendant was informed of his rights as provided in section one hundred and ninety-six, and that, after being so informed, he made the statement;

2. It must contain the questions put to him, and his answers thereto, as provided in sections one hundred and ninety-eight and one hundred and ninety-nine;

3. It may be signed by the defendant, or he may refuse to sign it; but if he refuse to sign, his reason therefor must be stated as he gives it;

4. It must be signed and certified by the magistrate.

See *People v. Webster*, 3 Park. 503; 14 How. 242; *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 172; *People v. Chapleau*, 121 N. Y. 266; *People v. Restell*, 3 Hill, 289; *People v. Moore*, 15 Wend. 419.

The omission of a complainant or his witnesses to sign the deposition taken before a committing magistrate as required by the Code of Criminal Procedure, is an irregularity which will be held to be waived unless the defendant has interposed the objection at the first available opportunity. *People v. Winness*, 3 N. Y. Cr. Rep. 89.

§ 201. After statement of waiver, defendant's witnesses to be examined.— After the waiver of the defendant to make a statement, or after he has made it, his witnesses, if he produce any, must be sworn and examined.

§ 202. Witnesses to be kept apart.— The witnesses produced on the part either of the people or of the defendant cannot be present at the examination of the defendant; and while a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

See 1 Greenl. Ev. (14th ed.), § 432; Thompson Trials, § 275; 16 Am. St. 25.

§ 203. **Who may be present at examination.**— The magistrate may also exclude from the examination every person, except the clerk of the magistrate, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel and the officer having the defendant in custody.

§ 204. **Testimony, how taken and authenticated.**— The testimony given by each witness must be reduced to writing, as a deposition, by the magistrate or under his direction, and authenticated in the following manner:

1. The authentication must state the name and age of the witness, his place of residence, and his business or profession;

2. It must, unless deposition by question and answer be waived by the defendant and the witness, contain the questions put to the witness and his answers thereto, each answer being distinctly read to him as it is taken down and being corrected or added to, until it is made conformable to what he declares to be the truth;

3. If a question put be objected to on either side, and overruled, or the witness decline answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated;

4. The deposition must be signed by the witness, or if he refuse to sign it, his reason for refusing must be stated in writing as he gives it;

5. It must be signed and certified by the magistrate.

See *People v. Johnson*, 46 Hun, 671; *People v. Winness*, 3 N. Y. Cr. Rep. 89.

§ 205. **Depositions and statement; how and by whom kept.**— The magistrate or his clerk must keep the depositions taken on the information or on the examination, and the statement of the defendant, if any, until they are returned to the proper court; and must not permit them to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney general, the district attorney of the county, and the defendant and his counsel, and the complainant and his counsel.

See *People v. Johnson*, 46 Hun, 671.

§ 206. **Defendant entitled to copies of depositions and statement.**— If the defendant be held to answer the charge, the

magistrate or his clerk having the custody of the depositions taken on the information or examination, and of the statement of the defendant, must, on payment of his fees at the rate of five cents for every hundred words, and within two days after demand, furnish to the defendant, or his counsel, a copy of the depositions and statement, or permit either of them to take a copy.

§ 207. Defendant, when and how to be discharged. — After hearing the proofs, and the statement of the defendant, if he have made one, if it appear, either that a crime has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement, signed by him, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged."

See *Secor v. Babcock*, 2 Johns. 203.

After a prisoner has given bail to the court of sessions the committing magistrate cannot discharge him. *Sandrock v. Knop*, 81 How. Pr. 191.

§ 208. When and how to be committed. — If, however, it appear from the examination that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement, an order, signed by him, to the following effect: "It appearing to me by the within depositions [and statement, if any] that the crime therein mentioned [or any other crime according to the fact, stating generally the nature thereof] has been committed, and that there is sufficient cause to believe the within named guilty thereof, I order that he be held to answer the same."

See *People v. Johnson*, 46 Hun, 671; *People v. McCurdy*, 68 Cal. 576; *Matter of Hogan*, 55 How. Pr. 458; *Lindsay v. People*, 67 Barb. 548; *Matter of Smith*, 5 Cow. 273; *Pratt v. Hill*, 16 Barb. 303; *People v. Rhoner*, 4 Park. 166.

The warrant of commitment need not be under seal. *Gall v. Hall*, 42 N. Y. 67; *Bennac v. People*, 4 Barb. 81; *Millet v. Baker*, 42 id. 215; *People v. Rawson*, 61 id. 619.

A person taken to jail under a commitment which is illegal cannot be held by subsequently making out a legal commitment. *Shank's Case*, 15 Abb. Pr. (N. S.) 39. See *Matter of Barre*, 14 Abb. Pr. (N. S.) 426; *People v. Connor*, 15 id. 430.

The prisoner may be held until the warrant is perfected. *Matter of Crandall*, 2 Cal. 144.

§ 209. **Order for commitment.**—If the crime be not bailable, the following words, or words to the same effect, must be added to the indorsement: "And that he be committed to the sheriff of the county of _____," [or in the city and county of New York, "to the keeper of the city prison of the city of New York."]

§ 210. **Certificate of bail being taken.**—If the crime be bailable, and bail be taken by the magistrate, the following words, or words to the same effect, must be added to the indorsement mentioned in section two hundred and eight: "And I have admitted him to bail to answer, by the undertaking hereto annexed"

See *People v. Hurlbutt*, 44 Barb. 126.

§ 211. **Defendant to choose how he shall be tried.**—If the crime with which the defendant is charged be one triable, as hereinbefore provided, by a court of special sessions of the county in which the same was committed, the magistrate, before holding the defendant to answer, must inform him of his right to be tried by a jury after indictment, and must ask him how he will be tried. If the defendant shall require to be tried by a jury after indictment, he can only be held to answer to a court having authority to inquire by the intervention of a grand jury into offenses triable in the county. If he shall not so require, he may be held to answer at the court of special sessions.

See *People v. McGann*, 43 Hun, 56; *People v. Burleigh*, 1 N. Y. Cr. Rep. 522.

In *People v. Austin*, 49 Hun, 367, the court say: "This last section (§ 211) seems to have been adopted for the purpose of preserving a practice which prevailed prior to the adoption of the Code of Criminal Procedure. *People v. Putnam*, 3 Park. 386; *Hill v. People*, 20 N. Y. 363."

In *People v. Stark*, 17 State Rep. 237, defendant was convicted in a court of special sessions of a violation of the excise law. *Held*, that he was not entitled to give bail to await the action of the grand jury. The court in speaking of this section say: "This provision must necessarily relate to crimes also triable by jury after indictment; and can have no application to cases in which courts of special sessions have exclusive jurisdiction. Moreover the inclusion of the offense with which the defendant was charged in the list of those of which courts of special sessions have exclusive jurisdiction, was by an amendment of section 56, subsequent to the enactment of section 211, and that amendment, being plainly inconsistent with the provisions of the latter section, so far as it related to the offense in question, (among others), those provisions must be held to have been *pro tanto* repealed thereby."

§ 212. **Order for bail, on commitment.**— If the crime be bailable and the defendant be admitted to bail, but bail have not been taken, the following words, or words to the same effect, must be added to the indorsement mentioned in section two hundred and eight, “and that he be admitted to bail in the sum of dollars, and be committed to the sheriff of the county of ,” [or in the city and county of New York, “to the keeper of the city prison of the city of New York,”] until he gives such bail.

§ 213. **Form of commitment.**— If the magistrate order the defendant to be committed, as provided in sections two hundred and nine and two hundred and twelve, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or if that officer be not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment.

§ 214. **Form of commitment.** — The commitment must be to the following effect :

“COUNTY OF ALBANY [or as the case may be].

“In the name of the people of the State of New York :

“To the sheriff of the county of Albany” [or in the city and county of New York, “to the keeper of the city prison of the city and county of New York”].

“An order having this day been made by me, that A. B. be held to answer to the court of upon a charge of [stating briefly the nature of the crime], you are commanded to receive him into your custody, and detain him until he be legally discharged.

“Dated at the *City of Albany* [or as the case may be], this
day of , 18 .

“C. D.,

“*Justice of the Peace.*”

[Or as the case may be.]

In *People v. Johnson*, 110 N. Y. 134, 142, one of the commitments recited that defendant was held on a charge of “burglary in the third degree”; another that he was held upon a charge of “grand larceny in the first degree.” *Held*, these statements were a substantial compliance with the provision of the section; that a reference to the statutory definition of the crime showed, with sufficient clearness and precision for the purpose in view, the nature of the crime.

§ 215. Undertaking of witnesses to appear; when and how taken.— On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people, a written undertaking, to the effect that he will appear and testify at the court to which the depositions and statement are to be sent, or that he will forfeit the sum of one hundred dollars.

§ 216. Security for appearance of accomplice as witness.— When the magistrate is satisfied, by proof on oath, that there is reason to believe that any such witness is an accomplice in the commission of the crime charged, he may order the witness to enter into a written undertaking with such sureties, and in such sum, as he may deem proper, for his appearance as specified in the last section.

§ 217. Witness under sixteen.— Children under the age of sixteen years, when witnesses, may be committed as provided by section two hundred and ninety-one of the Penal Code, subject to the order of the trial court. [*Amended 1892, ch. 279; in effect Sept. 1, 1892.*]

§ 218. Witness to be committed on refusal to give security for appearance.— If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him to prison until he comply or be legally discharged.

§ 219. Witness may be conditionally examined on behalf of people.— A witness may be conditionally examined on behalf of the people in the manner and with the effect provided by title twelve, chapter three of this Code, for taking examination of witnesses conditionally on behalf of the defendant. A copy of the order and affidavit upon which the application is made, together with notice of the time and place where the examination is to be taken, shall be served on the defendant, and his counsel, if he have any, at least two days before the time fixed for such examination, and the defendant may be present personally upon such examination to confront the witness produced against him, if the defendant have no counsel the order shall contain a provision assigning counsel to him for the purpose of such

examination, upon whom a copy of said order, affidavit and notice shall be served.

§ 220. Repealed in 1883, chap. 416, § 4.

§ 221. **Magistrate to return depositions, statements and undertakings of witnesses, to the court.**—When a magistrate has discharged a defendant, or has held him to answer, as provided in sections two hundred and seven and two hundred and eight, he must return to the next court of oyer and terminer or court of sessions of the county, or city court having power to inquire into the offense by the intervention of a grand jury, at or before its opening on the first day, the warrant, if any, the depositions, the statement of the defendant, if he have made one, and all undertakings of bail, or for the appearance of witnesses, taken by him.

TITLE IV.

OF PROCEEDINGS AFTER COMMITMENT, AND BEFORE INDICTMENT.

CHAPTER I. Preliminary provisions.

II. Formation of the grand jury; its powers and duties.

CHAPTER I.

PRELIMINARY PROVISIONS.

SECTION 222. Crimes; how prosecuted.

§ 222. **Crimes; how prosecuted.**—All crimes prosecuted in a court of oyer and terminer, or in a court of sessions, or in a city court, must be prosecuted by indictment.

State Const., art. I, § 6; Fed. Const., art. V.

The right to be charged by indictment or presentment is a fundamental right of a party which cannot be waived by him so as to deprive such party of afterward setting up the want of jurisdiction in the court to try him.

Matter of McCluskey, 40 Fed. Rep. 71; 12 Cr. L. Mag. 210.

CHAPTER II.

FORMATION OF THE GRAND JURY, ITS POWERS AND DUTIES.

- SECTION 223, 224.** Grand jury defined.
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252. Power of grand jury to inquire into crimes, etc.
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257. Grand jury not bound to hear evidence for the defendant, but may order explanatory evidence to be produced.
258. Degree of evidence to warrant an indictment.
259. Grand jurors must declare their knowledge as to commission of a crime.
260. Grand jury must inquire as to persons imprisoned on criminal charges and not indicted; the condition of public prisons, and the misconduct of public officers.
261. Grand jury entitled to access to public prisons, and to examine public records.
- 262, 263, 264. When and from whom they may ask advice, and who may be present during their sessions.
265. Secrets of the grand jury to be kept.
266. Grand jury; when bound to disclose the testimony of a witness.
267. Grand juror not to be questioned for his conduct as such.

§ 223. **Grand jury defined.** — A grand jury is a body of men, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, and chosen by lot, and sworn to inquire of crimes committed or triable in the county.

See 12 Am. St. 900, note; 1 Chic. Leg. News, 20; 4 Crim. L. Mag. 471; 8 id. 711; 27 Can. L. J. 4; 9 Amer. & Eng. Ency. of Law, 1.

In *Matter of Bain*, 121 U. S. 1, the court say: "The importance of the part played by the grand jury in England cannot be better illustrated than by the language of Justice Field, in a charge to a grand jury, reported in 2 Sawy. 667. 'The institution of the grand jury,' he says, 'is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentators on the laws of that country, that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.'"

"The grand jury is merely an appendage of the court, of which the judge is the head or controlling power." Thomp. Trials, § 168.

In *People, ex rel., v. Sheriff*, 11 Civ. Proc. Rep. (County Ct. Chautauqua County), it is said that the grand jury "is no part of the court; the court can exist without it."

But in *Matter of Choate* (Gen. Term, 1st Dept.), 41 Alb. L. J. 287, Barrett, J., said: "It is clear from the elementary writers, and from what the court of appeals implied in the *Hackley Case*, 24 N. Y. 78, that the grand jury room is an enlargement of the court-room and part of the court sitting.

* * * In *People v. Naughton*, Mr. Justice Pratt held that the grand jury was a constituent part of the court of oyer and terminer, and that its pro-

ceedings were a part of the proceedings of that court. See page 438. In *People, ex rel. Hackley, v. Kelly*, 21 How. Pr. 54, the supreme court of this department at general term held that the grand jury was an adjunct of the court as well as the petit jury. It was there insisted that the commitment was illegal because the contempt did not occur in the presence of the court, but in the grand jury room before the jury as an independent body. Leonard, J., answered this contention by saying that 'when summoned, sworn and organized the grand jury are a constituent part of the court for the performance of the functions and duties devolved upon the court, as much as a body of twelve petit jurors impanelled for the trial of a person charged with crime. * * * When the witness has been brought before the grand jury to testify he is for the time in the custody or under the control of the court and the grand jury. He stands in the same relation to the court as a witness on the stand before the court and a petit jury.'" See, also, *Bergh's Case*, 16 Abb. Pr. (N. S.) 266; *People v. Briggs*, 60 How. Pr. 21.

§ 224. Grand jury defined.—The grand jury must consist of not less than sixteen and not more than twenty-three persons, and the presence of at least sixteen is necessary for the transaction of any business.

A common-law grand jury must contain not over twenty-three nor under twelve. 4 Bl. Com. 302.

It is error to swear twenty-four persons as a grand jury. *People v. King*, 2 Caines, 98.

A conviction will not be reversed because the indictment purports to have been found by twenty-four grand jurors, if the objections were not taken in court below. *Conkey v. People*, 1 Abb. Dec. 418; 5 Park. 31.

§ 225. For what courts to be drawn; the order.—A grand jury must be drawn for every term of the following courts:

1. The court of oyer and terminer, except in the city and county of New York, and the county of Kings, and except for extraordinary or adjourned terms;
 2. The court of general sessions of the city and county of New York and the court of sessions of the county of Kings; and
 3. The city courts whenever an indictment can be there found.
- See *People v. Rugg*, 98 N. Y. 545; 3 N. Y. Cr. Rep. 176.

§ 226. For what courts to be drawn; the order.—A grand jury may also be drawn.

1. For every other court of sessions, when specially ordered by the court or by the board of supervisors;
2. For the court of oyer and terminer in the city and county of New York, upon the order of a judge of the supreme court, elected in the first judicial district;

3. For the court of oyer and terminer of the county of Kings, upon the order of a judge of the supreme court elected in the second judicial district.

See *People v. Rugg*, 98 N. Y. 545; 3 N. Y. Cr. Rep. 172.

§ 227. **For what courts to be drawn; the order.** — If made by the court or a judge thereof, the order for a grand jury must be entered upon its minutes, and a copy thereof filed with the county clerk at least twenty days before the term for which the jury is ordered. If made by the board of supervisors a copy thereof, certified by the clerk of the board, must be filed with the county clerk, at least twenty days before the term; and when so filed, is conclusive evidence of the authority for drawing the jury.

See *People v. Rugg*, 98 N. Y. 545; 3 N. Y. Cr. Rep. 176.

§ 228. **Misdescription in order.** — A misdescription of the title of the court in an order for a grand jury does not affect the validity of the order, if it can be plainly understood therefrom what court is intended.

§ 229. **Mode of selecting grand jurors.** — The mode of selecting grand jurors is prescribed by special statutes.

See 2 Birdseye's Statutes, 1268; Code Civil Proc., § 1041.

§ 230. **If sixteen grand jurors do not appear, additional number to be ordered.** — If at any court of oyer and terminer or court of sessions, except in the counties of Genesee, Orleans, and St. Lawrence, there shall not appear at least sixteen persons, duly qualified to serve as grand jurors, who have been summoned, or if the number of grand jurors attending shall be reduced below sixteen, such court must, by order to be entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of grand jurors as shall be necessary, and must specify the number required in the order.

§ 231. **Manner of designating the additional grand jurors.** — The clerk of the county must forthwith bring into the court the box containing the names of the grand jurors, from which grand jurors in the county are required to be drawn; and he must, in the presence of the court, proceed publicly to draw

the number of grand jurors specified in the order ; and when such drawing is completed, he must make two lists of the persons so drawn, each of which must be certified by him to be a correct list of the names of the persons so drawn by him, one of which he must file in his office, and the other he must deliver to the sheriff.

§ 232. **Manner of designating the additional grand jurors.** — The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated in the list, provided in section two hundred and thirty-one, to appear in the court requiring their attendance at the time designated, and they must attend and serve as if they had been originally summoned as grand jurors, and subject to the same penalties, unless excused or discharged by the court.

§ 233. **Manner of designating the additional grand jurors.** — In the counties of Genesee, Orleans and St. Lawrence, the names of the persons required to complete the grand jury may in the discretion of the court, be drawn as provided in the last section, or may be publicly designated by the court, from the bystanders or the body of the county.

§ 234. **Summoning the additional grand jurors, and compelling their attendance.** — The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated, as provided in the last two sections, who must attend and serve as if they had been originally summoned as grand jurors, and are subject to the same penalties, unless excused or discharged by the court.

§ 235. **When new grand jury may be summoned for the same court.** — If a crime be committed during the sitting of the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered, that the sheriff summon another grand jury ; and the same shall be summoned, in the manner prescribed for grand juries in general.

See *Allen v. People*, 57 Barb. 333.

§ 236. **Grand jury, how drawn when more than a sufficient number attends.** — When more than twenty-three persons summoned as grand jurors attend for service, the clerk must prepare separate ballots containing their names, folded as nearly alike as possible, and so that the names cannot be seen, and must deposit them in a box. He must then openly draw out of the box twenty-three ballots; and the persons whose names are drawn constitute the grand jury. The names remaining in the box, as well as those drawn, must be returned to the box of drawn grand jurors.

§ 237. **Who may challenge an individual grand juror.** — The district attorney in behalf of the people and also a person held to answer a charge for a crime may challenge an individual grand juror. [*Amended 1892, ch. 279; in effect Sept. 1, 1892.*]

See 2 Hawk P. C., ch. 25, § 16; 1 Bish. Crim. Proc., § 876.

§ 238. **Causes of discharge of the panel.** — There is no challenge allowed to the panel or to the array of the grand jury, but the court may, in its discretion, at any time discharge the panel and order another to be summoned, for one or more of the following causes:

1. That the requisite number of ballots was not drawn from the grand jury box of the county;
2. That notice of the drawing of the grand jury was not given;
3. That the drawing was not had, in the presence of the officers designated by law; and
4. That the drawing was not had, at least fourteen days before the court.

See *People v. Hooghkerk*, 96 N. Y. 158; *People v. Fitzpatrick*, 30 Hun, 493; 66 How. Pr. 14; 1 N. Y. Cr. Rep. 438; *People v. Petrea*, 30 Hun, 102, 103; 92 N. Y. 128; *Carpenter v. People*, 64 id. 483; *People v. Jewett*, 3 Wend. 214; *People v. Harriott*, 3 Park. 112; *Dolan v. People*, 64 N. Y. 485; *People v. Duff*, 65 How. Pr. 374, 375; *U. S. v. Tallman*, 10 Blatchf. 31.

§ 239. **Causes of challenge to an individual grand juror.** — A challenge to an individual grand juror may be interposed for one or more of the following causes, and for these only:

1. That he is a minor;
2. That he is an alien;
3. That he is insane;

4. That he is the prosecutor upon a charge against the defendant ;

5. That he is a witness for either party, if the court is satisfied in the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging. [*Amended* 1892, *ch.* 279 ; *in effect* Sept. 1, 1892.

6. That a state of mind exists on his part, in reference to the case or to either party, which satisfies the court, in the exercise of sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging.

See Abbott's *Crim. Brief*, § 94 ; 4 *Crim. Law Mag.* 174 ; *People v. Hooghkerk*, 96 N. Y. 158.

Not essential that a grand juror shall be a freeholder. *Dolan v. People*, 64 N. Y. 485 ; *People v. Jewett*, 6 Wend. 386. But see *State v. Hamlin*, 47 Conn. 95 ; 36 Am. Rep. 54.

The following is taken from 23 Alb. L. J. 324 :

The question whether the personal incompetency of a grand juror can be taken advantage of after indictment found is much mooted. In the affirmative are Alabama, Virginia, Maine, New Hampshire, Vermont, North Carolina, New Jersey, Tennessee, Georgia, Mississippi, Texas, Arkansas, Nebraska and Rhode Island. In the negative, Massachusetts, New York, Indiana, Pennsylvania, Minnesota. But it is almost universally held that the objection must be raised before general issue, either on motion to quash, or by plea in abatement. *State v. Easter*, 30 Ohio St. 542 ; 27 Am. Rep. 478 ; Whart. Cr. Pl., § 350, etc. Thus, in *State v. Easter*, *supra*, it was held not a good plea to an indictment for murder, that one of the grand jury which found the indictment was a nephew of the murdered man. This case contains a learned review of the authorities, but does not decide the question whether the objection would be good after indictment and before general issue.

In *Wallace v. State*, 2 Lea, 29, among recent cases, it was held that objections to the manner of selection and appointment of a grand jury can only be taken by plea in abatement. And in *Reich v. State*, 55 Ga. 73 ; 21 Am. Rep. 265, it was held that it is a good plea in abatement that one of the grand jurors was an alien ; and so that the venire summoning the grand jury was not sealed. *State v. Flemming*, 66 Me. 142 ; 22 Am. Rep. 552.

The most recent reported decision on this point is *State v. Davis*, 12 R. I. 492, holding that an objection to a grand juror for want of the statutory qualifications may be raised by plea of abatement. The court in this well-considered case observe : " The attorney-general contends that the objection comes too late after the jury has been impanelled and sworn. He cites cases which hold that such is the rule : *Com. v. Smith*, 9 Mass. 107, 110 ; *Com. v. Gee*, 6 Cush. 174 ; *People v. Jewett*, 3 Wend. 314, 321 ; at least if the accused has previously been held to answer. *People v. Beatty*, 14 Cal. 566. Other cases hold that the objection may be taken by plea in abatement. *State v. Rockafellow*, 6 N. J. Law, 332 ; *Com. v. Cherry*, 2 Va. Cas. 20 ; *Stanley v. State*, 16 Tex. 557 ; *State v. Middleton*, 5 Port. 484 ; *Barney v. State*, 12 S. & Marsh. 68 ; *State v. Duncan*, 6 Yerg. 271 ; *Doyle v. State*, 17 Ohio, 222 ; *Huling v. State*, *id.* 583 ; *Kirol v. State*, 9 Fla. 9. We think these latter cases rest on the

stronger reasons. It is certainly not reasonable to require a person, who has not been held to answer, to object to the juror before he is impanelled; for he may be on the other side of the globe, or he may have no reason to suppose he is going to be indicted, being guiltless. And even if a person has been held to answer, he may be in prison, or sick at home, or if in court, he may be ignorant, without fault, of the disqualification of the juror until after he has been sworn. Indeed, a person may be indicted for an offense committed pending the inquest. Moreover, the action of the grand jury is *ex parte* and preliminary, and it is contrary to principle to hold that a person shall forfeit his rights by not intervening in a proceeding to which he is not a party. No English case has been cited, but English treatises of authority recognize the plea. 3 Hale P. C. 155; Bacon Abr., Juries, A; 1 Chitty Crim. Law, 309. The statute 11 Henry IV, chap. 9, which has been referred to as the source of the English rule, is deemed to be declaratory of the common law. *State v. Foster*, 9 Tex. 65; *Com. v. Cherry*, 2 Va. Cas. 20."

In *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54, it was held that any objection to the competency of a grand juror, on account of his previous expression of opinion that the accused is guilty, must be taken before the grand jury is sworn. The court said: The expression of an opinion that an accused person is guilty, by a grand juror before he was sworn, appears never to have been a ground of challenge in the English courts. Some respectable authorities in this country hold that it is, but these generally hold that the exception must be taken before the grand jury is sworn. The common law requires grand jurors to be good and lawful freeholders and inhabitants of the county, and where that law prevails a disqualified grand juror may be challenged before indictment found. 3 Bac. Abr., Juries, A; 1 Chitty Crim. Law, 309; *U. S. v. Williams*, 1 Dill. 492. In *People v. Jewett*, 3 Wend. 314, it is said: 'There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison or out on recognizance, and it is even said that a person wholly disinterested may as *amicus curie* suggest that a grand juror is disqualified. But such objection to be availing must be made previous to the jurors being impaneled and sworn. In the case of *U. S. v. Burr*, before the circuit court of the United States at Richmond, Va., the prisoner was allowed to challenge grand jurors, on the ground that they had formed and expressed opinions of the prisoner's guilt. But the challenges were made before the grand jury was impaneled and sworn. Burr's trial by Robertson, 38. In *Tucker's Case*, 8 Mass., the court said that *Burr's Case* was solitary in allowing challenges to grand jurors, and a juror objected to by the *amicus curie* was sworn. In *Com. v. Smith*, 9 Mass. 107, it was held that objections to the personal qualification of a grand juror or to the legality of the returns cannot affect any indictments found by the jury after they have been received by the court and filed. In *Musick v. People*, 40 Ill. 268, it was held that if an expression of opinion by a grand juror were a ground of challenge, the objection must be taken before the juror is sworn. In Indiana a person under prosecution for crime, and in custody or on bail, may challenge for good cause any person returned or placed on the grand jury. *Hudson v. State*, 1 Blackf. 317; *Jones v. State*, 2 id. 475; *State v. Herndon*, 5 id. 75; *Hardin v. State*, 22 Ind. 347; *Mershom v. State*, 51 id. 14. In *Hardin v. State*, the court say that 'no doubt challenges to the polls may be

made where any of the jurors have not the necessary qualifications. These challenges, however, must be made before the jury are sworn and charged." In Pennsylvania the defendants in the case of *Com. v. Clark*, 2 Browne, 325, being in jail on a charge of homicide, were allowed to challenge grand jurors for favor before the grand jury were sworn. In New Jersey the court in the case of *State v. Rockafellow*, 1 Halst. 332, held that it was a good plea in abatement to an indictment for rape that one of the grand jurors by whom the bill was found was not a freeholder as required by the statutes of that state. In *State v. Richey*, 5 Halst., a plea in abatement of the indictment, that two of the grand jurors who found it had expressed an opinion before they were sworn, was not sustained. See, also, *U. S. v. White*, 5 Cr. C. C. 457; *Boyington v. State*, 2 Port. 100; *State v. Easton*, 30 Ohio St. 542; 27 Am. Rep. 478; *Gibbs v. State*, 45 N. J. Law, 379; 46 Am. Rep. 782. If a disqualification discovered after indictment found can be taken advantage of, it must be one that is pronounced such by the common law, or by the statute (if it be a matter of statute), and one that absolutely disqualifies, as alienage or the want of a freehold."

§ 240. Manner of taking and trying the challenges.— Challenges to individual grand jurors may be oral, and must be entered upon the minutes, and tried by the court in the same manner as challenges in the case of a trial jury.

See Code Civ. Proc., § 1180.

The provision that the challenge must be tried and determined by the court only, is constitutional. *People v. Tweed*, 11 Hun, 195; *Weston v. People*, 6 id. 140.

§ 241. Decision upon the challenge.— The court must allow or disallow the challenge, and the clerk must enter its decision upon the minutes.

§ 242. Effect of allowing a challenge to an individual grand juror.— If a challenge to an individual grand juror be allowed for any of the causes mentioned in subdivisions one, two or three of section two hundred and thirty-nine, he must be forthwith discharged from the grand jury. If such challenge be allowed for any of the causes mentioned in subdivisions four, five or six of section two hundred and thirty-nine, the juror challenged cannot be present at or take part in the consideration of the charge against the defendant mentioned in or who interposed the challenge, or in the deliberations or vote of the grand jury thereon. [*Amended 1892, ch. 279; in effect Sept. 1, 1892.*]

§ 243. Violation of last section.— The grand jury must inform the court of a violation of the last section, and the same is punishable by the court as a contempt.

See *People, ex rel., v. Court of Oyer and Terminer*, 101 N. Y. 251; 3 How. (N. S.) 418; 4 N. Y. Cr. Rep. 75.

§ 244. Appointment of foreman.— From the persons summoned to serve as grand jurors, and appearing, the court must appoint a foreman. The court must also appoint a foreman when a person already appointed is discharged or excused before the grand jury are dismissed.

§ 245. Oath of the foreman and the other grand jurors. The following oath must be administered to the foreman of the grand jury: "You, as foreman of this grand jury, shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this state, your fellows' and your own you shall keep secret; you shall present no person from envy, hatred or malice; nor shall you leave anyone unrepresented through fear, favor, affection or reward, or hope thereof; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God."

§ 246. Oath of the foreman and the other grand jurors. The following oath must be immediately thereupon administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God."

§ 247. Oath of the foreman and the other grand jurors. If, after the foreman and the grand jurors then present are sworn, any other grand juror appear, and be admitted as such, the oath, as prescribed in section two hundred and forty-five, must be administered to him, commencing, "You, as one of this grand jury," and so on, to the end.

§ 248. Charge of the court.— The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must read to them the provisions of this Code, from section two hundred and fifty-two to section two hundred and sixty-seven, both inclusive, or give them a copy thereof, and must give them such information as it may deem proper, as to the nature of their duties, and any charges and crimes returned

to the court, or likely to come before the grand jury. The court need not, however, charge them respecting violations of a particular statute, excepting when so requested by the district attorney. [*Amended 1892, ch. 279; in effect Sept. 1, 1892.*]

§ 249. **Retirement of the grand jury.**—The grand jury must then retire to a private room and inquire into the offenses cognizable by them.

§ 250. **Appointment of a clerk, and his duties.**—The grand jury must appoint one of their number as clerk, who is to preserve minutes of their proceedings (except of the votes of the individual members on a presentment or indictment), and of the evidence given before them.

See *People v. Baker*, 10 How. Pr. 567.

§ 251. **Discharge of the grand jury.**—The grand jury, on the completion of the business before them, must be discharged by the court; but whether the business be completed or not, they are discharged by the final adjournment of the court.

Grand jury cannot be discharged retroactively by an order providing that it shall take effect as of a date prior to their action as a grand jury. *People v. Fitzpatrick*, 30 Hun, 493; 66 How. 14.

§ 252. **Power of grand jury to inquire into crimes, etc.**—The grand jury has power, and it is their duty, to inquire into all crimes committed or triable in the county, and to present them to the court.

See *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 191; *People v. Hyler*, 2 Park. 566; *French v. People*, 3 id. 114; *People v. Page*, id. 600; *People v. Horton*, 4 id. 222; *People v. Heffernan*, 5 id. 393.

§ 253. **Foreman may administer oaths.**—The foreman may administer an oath to any witness appearing before the grand jury.

§ 254. **Definition of an indictment.**—An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime.

What indictment should contain, see § 275, *post*.

See 4 Bl. Com. 299; 1 Chit. Crim. Law, 168; Coke Litt. 126; *People v. Dunmar*, 106 N. Y. 509; *People v. Gates*, 18 Wend. 317; *People v. White*, 24 id. 570; *People v. Dunn*, 53 Hun, 384.

§ 255. **Evidence receivable before the grand jury.**— In the investigation of a charge, for the purpose of indictment, the grand jury can receive no other evidence than :

1. Such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence ; or
2. The deposition of a witness, in the cases mentioned in the third subdivision of section eight.

See *People v. Hyler*, 2 Park. 566; *People v. Dunn*, 53 Hun, 384; *People v. Briggs*, 60 How. Pr. 17; *United States v. Reed*, 2 Blatchf. 435; *People v. Tindler*, 19 Cal. 539; *U. S. v. Kilpatrick*, 16 Fed. 765.

§ 256. **Evidence receivable before the grand jury.**— The grand jury can receive none but legal evidence.

See *People v. Hyler*, 2 Park. 566; *People v. Briggs*, 60 How. Pr. 17; *People v. Sellick*, 4 N. Y. Cr. Rep. 334; *People v. Dunn*, 53 Hun, 384; *U. S. v. Kilpatrick*, 16 Fed. Rep'r, 765; *People v. Singer*, 18 Abb. N. C. 101, note.

§ 257. **Grand jury not bound to hear evidence for the defendant, but may order explanatory evidence to be produced.**— The grand jury is not bound to hear evidence submitted for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence, within their reach, will explain away the charge, they should order such evidence to be produced; and for that purpose may require the district attorney to issue process for the witnesses.

The grand jury have not power to require the accused to appear before them even for the purpose of giving opportunity for voluntary explanations. *People v. Singer*, 18 Abb. N. C. 96; 5 N. Y. Cr. Rep. 2.

§ 258. **Degree of evidence, to warrant an indictment.**— The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

See *People v. Baker*, 10 How. Pr. 567; *People v. Hyler*, 2 Park. 570; *People v. Price*, 6 N. Y. Cr. Rep. 144; 53 Hun, 185.

§ 259. **Grand jurors must declare their knowledge as to commission of a crime.**— If a member of the grand jury know, or have reason to believe, that a crime has been committed, which is triable in the county, he must declare the same to his fellow jurors, who must thereupon investigate the same.

§ 260. Grand jury must inquire as to persons imprisoned on criminal charges and not indicted ; the condition of public prisons, and the misconduct of public officers. — The grand jury must inquire :

1. Into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted ;
2. Into the condition and management of the public prisons in the county ; and
3. Into the willful and corrupt misconduct in office of public officers of every description in the county.

§ 261. Grand jury entitled to access to public prisons, and to examine public records. — They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records in the county.

§ 262. When and from whom they may ask advice, and who may be present during their sessions. — The grand jury may, in any case, ask the advice of any judge of the court, or of the district attorney of the county.

§ 263. When and from whom they may ask advice, and who may be present during their sessions. — Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and of issuing subpoenas or other process for witnesses.

§ 264. When and from whom they may ask advice, and who may be present during their sessions. — The district attorney of the county must be allowed, at all times, to appear before the grand jury, at his request, for the purpose of giving information relative to any matter before them, but no district attorney, officer or other person, shall be present with the grand jury during the expression of their opinions, or the giving of their votes upon any matter.

§ 265. Secrets of the grand jury to be kept. — Every member of the grand jury must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he, or any other grand juror, may have voted, on a matter before them.

See 4 Bl. Com. 126.

§ 266. **Grand jury, when bound to disclose the testimony of a witness.** — A member of the grand jury may, however, be required by any court, to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony, or upon his trial therefor.

See 12 Cr. L. Mag, 583.

§ 267. **Grand juror not to be questioned for his conduct as such.** — A grand juror cannot be questioned for anything he may say, or any vote he may give, in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors.

TITLE V.

OF THE INDICTMENT.

CHAPTER I. Finding and presentation of the indictment.

- II. Form of the indictment.
- III. Amendment of the indictment.
- IV. Arraignment of the defendant.
- V. Setting aside the indictment.
- VI. Demurrer.
- VII. Plea.
- VIII. Removal of the action before trial.

CHAPTER I.

FINDING AND PRESENTATION OF THE INDICTMENT.

- SECTION 268.** Indictment must be found by twelve grand jurors, and indorsed by foreman.
- 269.** If not so found, depositions, etc., must be returned to the court, with dismissal indorsed.
- 270.** Effect of dismissal.
- 271.** Names of witnesses must be indorsed upon indictment.
- 272.** Indictment must be presented in presence of the grand jury and filed.

§ 268. Indictment must be found by twelve grand jurors and indorsed by foreman.—An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be indorsed, "a true bill," and the indorsement must be signed by the foreman of the grand jury.

That twelve grand jurors must concur, see 1 Bish. Crim. Proc., § 697; *People v. Shattuck*, 6 Abb. N. C. 33; *Dawson v. People*, 25 N. Y. 403.

As to indorsement by foreman, see 1 Bish. Crim. Law, § 698; *McGuffie v. State*, 17 Ga. 497; *State v. Brown*, 31 Vt. 602; *Wall v. State*, 23 Ind. 150.

See as to "signing." *Hamilton v. State*, 103 Ind. 96; 53 Am. Rep. 491, note.

In *Brotherton v. People*, 75 N. Y. 162, the court say: "The certificate of the foreman is no part of the indictment, but is the statutory mode of authenticating it, and the record furnishes evidence that it was so authenticated." *State v. Taggart*, 38 Me. 298; *State v. Hogan*, 31 Mo. 342.

§ 269. If not so found, depositions, etc., must be returned to the court, with dismissal indorsed.—If twelve grand jurors do not concur in finding an indictment, the depositions (and statement, if any) transmitted to them, must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed.

The grand jurors may be examined as to whether or not twelve grand jurors concurred in the finding. *People v. Shattuck*, 6 Abb. N. C. 33. See *People v. Briggs*, 60 How. Pr. 17.

Should return "not a true bill" or "not found." 1 Bish. Crim. Proc., § 697; *State v. Horton*, 63 N. C. 595; *Esterlong v. State*, 35 Miss. 210.

§ 270. Effect of dismissal.—The dismissal of a charge does not, however, prevent its being again submitted to a grand jury as often as the court may so direct. But without such direction it cannot be again submitted.

A criminal charge may be re-submitted to the grand jury as often as the court may so direct. *People v. Lynch*, 20 Weekly Dig. 9. See *People v. ...*, v. *Sheriff*, 11 Civ. Proc. 186.

In *People v. Warren*, 109 N. Y. 617, defendant struck one D. a blow on December 13, inflicting injuries which proved his death on January 5, following. A presentation to the grand jury was made during the life-time of D. upon a complaint of assault and battery, but it failed to find an indictment. After the death of D. an indictment charging defendant with the crime of manslaughter in the second degree was found for the same assault. Held, that it was not necessary to obtain leave of the court before submitting to the grand jury the complaint on which it found said indictment. That a conviction even of the offense of assault and battery would have been no bar to a prosecution for the graver crime subsequently developed.

§ 271. Names of witnesses must be indorsed upon indictment.—When an indictment is found the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, as provided in section two hundred and fifty-five, must be indorsed upon the indictment before it is presented to the court. If not so indorsed, the court must, upon the application of the defendant, at any time before trial, direct the names of such witnesses as they appear upon the minutes of the grand jury, to be furnished to him forthwith.

See *People v. Naughton*, 38 How. Pr. 430; 7 Abb. Pr. (N. S.) 421; *Eighmy v. People*, 79 N. Y. 546; *People v. Jaehne*, 4 N. Y. Cr. Rep. 166; *State v. Shores*, 81 W. Va. 491; 13 Am. St. Rep. 875.

§ 272. Indictment must be presented in presence of the grand jury and filed.—An indictment, when found by the grand jury, as prescribed in section two hundred and sixty-eight, must be presented by their foreman in their presence to the court, and must be filed with the clerk, and remain in his office as a public record, but it must not be shown to any person other than a public officer, until the defendant has been arrested or has appeared.

In *Dawson v. People*, 25 N. Y. 405-406, the court say: "There being no words in the statute indicating an intention on the part of the legislature that the indictment should be void if not so filed, this provision must be regarded as merely directory. 3 Mass. 232; 6 Wend. 486; 6 Hill, 42; id. 646; 3 Den. 526; 9 Paige, 17; 2 N. Y. 184; 1 Burr. 447; Smith's Com. on Statutes, §§ 670-690."

CHAPTER II.

FORM OF THE INDICTMENT.

SECTION 273. Forms of pleading heretofore existing, abolished.

274. First pleading for the people, is indictment.

275. Indictment, what to contain.

276. Form of indictment.

277. When defendant is indicted by fictitious or erroneous name, his true name may be inserted in subsequent proceedings.

278, 279. Indictment must charge but one crime and in one form, except where it may be committed by different means.

280. Statement as to time when crime was committed.

281. Statement as to person injured or intended to be injured.

282. Construction of words used in indictment.

283. Words used in a statute need not be strictly pursued.

SECTION 284. Indictment when sufficient.

- 285. Indictment not sufficient for defect of form, not tending to prejudice defendant.
- 286. Presumptions of law and matters of which judicial notice is taken, need not be stated.
- 287. Pleading a judgment or determination of, or proceeding before a court or officer of special jurisdiction.
- 288. Private statute, how pleaded.
- 289. Pleading in indictment for libel.
- 290. Pleading in indictment for forgery, where the instrument has been destroyed or withheld by defendant.
- 291. Pleading in indictment for perjury or subornation of perjury.
- 292. Upon indictment against several, one or more may be convicted or acquitted.

§ 273. Forms of pleading heretofore existing abolished

All the forms of pleading in criminal actions, heretofore existing, are abolished; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

See *People v. Willson*, 109 N. Y. 351; *People v. Dumar*, 106 id. 509; *People v. Conroy*, 97 id. 62; *People v. Rugg*, 98 id. 536; *People v. Menken*, 86 Hun, 94; 8 N. Y. Cr. Rep. 237; *People v. Petrea*, 80 Hun, 98; 64 How. 189; 1 N. Y. Cr. Rep. 198; affirmed, 93 N. Y. 128; 65 How. 59; 1 N. Y. Cr. Rep. 288; *People v. Dunn*, 53 Hun, 384.

§ 274. First pleading for the people, is indictment.—
The first pleading on the part of the people is the indictment.

§ 275. Indictment, what to contain.—The indictment must contain :

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;
2. A plain and concise statement of the act constituting the crime, without unnecessary repetition.

See *People v. Bliven*, 112 N. Y. 87; *People v. Willson*, 109 id. 351; *People v. Dimick*, 107 id. 29; 41 Hun, 621; *People v. Dunn*, 53 id. 384; *People v. Burns*, id. 276; *People v. Everest*, 51 id. 23; *People v. Klock*, 48 id. 276; *People v. Barber*, id. 199; *People v. Reavey*, 38 id. 421; *People v. Moore*, 37 id. 87; *People v. Bellows*, 1 How. Pr. (N. S.) 151; *People v. Peck*, 2 N. Y. Cr. Rep. 315; *People v. Farrell*, 28 State Rep. 44;

Where an indictment consists of two counts, only one of which is submitted to the jury, a reversal by the general term of a conviction thereon, on the ground of the insufficiency of the evidence under that count, will not be interfered with, although the evidence authorized a conviction under the other count. *People v. Conroy*, 97 N. Y. 62; 2 N. Y. Cr. Rep. 565.

Does not prohibit the charging of the offense in different form in different counts; and such an indictment is not subject to the objection that it charges more than one crime. *People v. Rugg*, 98 N. Y. 537.

The common-law doctrine as to repugnant allegations still obtains under this section, for if there be inconsistent or incongruous allegations in a count, the crime cannot be said to be stated plainly, or at all. Accordingly, where the charging part of the indictment alleges a tampering with a certificate of a statement relating to the result of an election, and afterward a mere copy of a statement is set forth, the count is bad for repugnancy. *People v. Wise*, 8 N. Y. Cr. Rep. 308; 2 How. Pr. (N. S.) 98.

Sections 275, 276, Code Crim. Proc., do not deprive the people of the right to state the acts constituting the supposed crime in different counts in different language appropriate to meet such circumstances and features of the event as may be developed on the trial, especially where there was no eye-witness of the event and the facts must be proved by circumstantial evidence. *People v. Menken*, 36 Hun, 93; 3 N. Y. Cr. Rep. 233.

Objection that indictment does not conform to sections 275-6 can only be taken by demurrer. *People v. Conroy*, 97 N. Y. 62; 2 N. Y. Cr. Rep. 565; *People v. Carr*, 3 id. 578.

Under this section the indictment must charge both the crime and the act constituting it; the omission of either is fatal. *People v. Dumar*, 106 N. Y. 502; 42 Hun, 83; 5 N. Y. Cr. Rep. 57.

An indictment charging the defendant with having committed the crime of perjury by giving material evidence in an action between certain parties for a limited divorce, contains a sufficient statement of the nature of the action in which it is claimed that the perjury was committed. *People v. Grimshaw*, 20 Week. Dig. 116; 33 Hun, 507.

§ 276. **Form of indictment.**—The indictment should be signed by the district attorney, and may be substantially in the following form:

Court of oyer and terminer of the county of [stating the proper county]; or,

Court of oyer and terminer of the city and county of New York; or,

Court of sessions of the county of [stating the proper county]; or,

Court of general sessions of the city and county of New York; or,

City court of the city of [stating the proper city].

THE PEOPLE OF THE STATE OF NEW YORK }
 against }
 A. B. }

The grand jury of the
[here insert the name of the county, or of the city, or of the city and county, in which the indictment is found], by this indictment, accuse A. B. of the crime of [here insert the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like, or if it be a misdemeanor, having no general name, such as libel, assault, or the like, insert a brief description of it, as it is given by statute], committed as follows :

The said A. B., on the day of , eighteen hundred and , at the town [or city or village, as the case may be] of in this county [here set forth the act charged as an offense].

·A. B.,

District Attorney of the county of

See *People v. Lenhardt*, 104 N. Y. 596; *People v. Bellows*, 1 How. Pr. (N. S.) 151; *People v. Willson*, 109 N. Y. 351; *People v. Farrell*, 28 State Rep. 44; *People v. Harris*, id. 298; *People v. Dumar*, 106 N. Y. 510; *People v. Willet*, 102 id. 246; *People v. Conroy*, 97 id. 68; *People v. Dimick*, 107 id. 27; 5 N. Y. Cr. Rep. 187; *People v. Menken*, 36 Hun, 92; *People v. Burns*, 53 id. 276; *People v. Everest*, 51 id. 23; *People v. Grimshaw*, 33 id. 507; *People v. Barber*, 43 id. 199; *People v. Rich*, 2 N. Y. Cr. Rep. 315.

§ 277. **When defendant is indicted by fictitious or erroneous name, his true name may be inserted in subsequent proceedings.**—If a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment.

See *People v. Everhardt*, 104 N. Y. 596; *Walter v. People*, 32 id. 163; *Lasure v. State*, 19 Ohio, 43; *State v. Burns*, 8 Nev. 251; *Powe v. State*, 69 Ala. 231; 44 Am. Rep. 513; *People v. Smith*, 1 Park. 327; *Barnesciotta v. People*, 10 Hun, 137; 69 N. Y. 612; *People v. Burns*, 2 N. Y. Cr. Rep. 398.

§ 278. **Indictment must charge but one crime and in one form, except where it may be committed by different means.**—The indictment must charge but one crime and in one form, except as in the next section provided :

See *People v. Dimick*, 107 N. Y. 31; *People v. Dumar*, 106 id. 510; *People v. Willson*, 109 id. 351; *People v. O'Donnell*, 46 Hun, 360; *People v. Callahan*, 29 Hun, 580; *People v. Cole*, 2 N. Y. Cr. Rep. 109, 110; *People v. Ward*, 3 id. 484; *People v. Lenhardt*, 4 id. 326; *People v. Powell*, id. 586; *People v. Klock*, 43 Hun, 276; *People v. Burns*, 53 id. 276; 25 State Rep. 99; *People v. Emerson*,

id. 467; 53 Hun, 488; *People v. Charbinenu*, 26 id. 491; 115 N. Y. 488; *People v. Harris*, 28 State Rep. 300; *People v. Crotty*, 30 id. 44; *People v. Everett*, 51 Hun, 20; *People v. Upton*, 28 id. 110; *People v. Moore*, 37 id. 87.

An indictment under the act in relation to lotteries (1 R. S. 666, § 39) charged that the accused "did unlawfully and knowingly offer to vend and to sell, and to barter and to furnish, and to supply and to procure, and to cause to be furnished and procured to and for" C. a lottery ticket. The indictment was assailed for duplicity in that it charged two separate and distinct offenses, *i. e.*, a sale to C. and a sale to some third person for him. *Held* untenable; that the indictment charged but a single offer to furnish to C. a lottery ticket for a consideration; the fact that the offer gave the choice of modes did not transform it into two separate and distinct offenses. *Read v. People*, 81 N. Y. 881.

An indictment containing two counts, the first charging the defendant with grand larceny, and the second charging him with having received the property alleged in the first count to have been stolen, is not demurrable on the ground that more than one crime is charged therein in violation of sections 278 and 279. Said sections are to be construed together and permit such an indictment. *People v. Infield*, 1 N. Y. Cr. Rep. 146.

§ 279. Charging crime in separate counts.—The crime may be charged in separate counts to have been committed in a different manner, or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts.

See *People v. Dimick*, 107 N. Y. 31; *People v. Willson*, 109 id. 351; *People v. Dumar*, 106 id. 510; *People v. Rose*, 52 Hun, 35; *People v. Everest*, 51 id. 20; *People v. Klock*, 48 id. 276; *People v. Burns*, 53 id. 276; *People v. Emerson*, id. 439; *People v. O'Donnell*, 46 id. 360; *People v. Menken*, 36 id. 97; *People v. Dunn*, 90 N. Y. 104; *People v. Callahan*, 29 Hun, 580; *People v. Cole*, 2 N. Y. Cr. Rep. 108; *People v. Lenhardt*, 4 id. 318.

If more than one crime be charged, except as permitted by the above section, the proper and only remedy is by demurrer; Code Crim. Proc., §§ 324, 331; *People v. McCarthy*, 110 N. Y. 314.

A count charging the use of different prohibited means to commit a crime is good. *People v. Davis*, 58 N. Y. 95.

A single felony may be charged in different ways in several counts, so as to meet the facts of the case. *Harris v. People*, 6 Thomp. & Cook, 206.

The second count in an indictment may refer to the allegations contained in the first, without repeating them. *People v. Graves*, 5 Park. 134.

The court has discretionary power to compel prosecution to elect one of several counts. *Hawker v. People*, 75 N. Y. 487.

There may be a joinder of various counts stating the same offense distinctly and separately in various ways, so as to meet the evidence, and the court will not put the prosecutor to an election. *Nelson v. People*, 5 Park. 39; 23 N. Y. 236; *Loneragan v. People*, 6 Park. 209; 50 Barb. 266.

A count charging an assault "with intent to do bodily harm," and also "with intent to kill," is good. The words "to do bodily harm" are mere sur-

plusage, unless they be added "without justifiable or excusable cause." *Dawson v. People*, 25 N. Y. 399.

A count for poisoning, which charges that the prisoner did administer, and did cause and procure to be administered, etc., is not bad for duplicity. *La-beau v. People*, 6 Park. 371; 83 How. 66.

Held, that counts for different offenses of the same grade and subject to the same punishment may be joined. *People v. Gates*, 18 Wend. 311.

Held, also, that counts for embezzlement and larceny may be joined in same indictment. *Coats v. People*, 4 Park. 662.

A count for counterfeiting silver coin may be joined with one for having possession of such coin with intent to utter it, though the punishment be different; but the prosecutor must elect. *Queen's Case*, 6 C. H. Rec. 63.

A count for forging a check may be joined with one for uttering and publishing it, etc. *People v. Rynders*, 12 Wend. 425.

Two distinct offenses requiring different punishments cannot be alleged in the same count. *Reed v. People*, 1 Park. 481.

And if so included and a conviction follows, judgment will be arrested. *People v. Wright*, 9 Wend. 193.

Several distinct misdemeanors may be joined, and the prosecution cannot be put to an election. *People v. Costello*, 1 Den. 83.

A count for selling spirituous liquors without license to divers citizens and to persons unknown, only embraces one offense. *People v. Adams*, 17 Wend. 475; *Hodgman v. People*, 4 Den. 235.

The joinder of several distinct misdemeanors is not ground for reversal on error, if the sentence be single and appropriate to either of the counts of the indictment. *Polinsky v. People*, 73 N. Y. 65.

A misjoinder of counts charging a misdemeanor and a felony does not entitle the defendant to have the indictment quashed, except in the discretion of the court. *People v. Court of Gen. Sess.*, 12 Hun, 395.

Though an indictment in different counts charge what are technically distinct offenses, yet if it be apparent that each relates to the same transaction, it may be sustained. *Taylor v. People*, 12 Hun, 212.

When but one and the same offense is charged in different counts, the district attorney must be put to an election. *Armstrong v. People*, 70 N. Y. 38.

When an indictment contains a count for rape and one for an assault with intent to commit rape, the district attorney is not bound to elect between them. *People v. Satterlee*, 5 Hun, 167.

When the ownership of property is variously charged in different counts, the district attorney must elect between them. *Phelps v. People*, 4 Hun, 401.

§ 280. Statement as to time when crime was committed.

The precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime.

See *People v. Jackson*, 111 N. Y. 869; 11 Crim. L. Mag. 223; *People v. Emerson*, 53 Hun, 440; 20 State Rep. 16; *People v. Krank*, 12 id. 846; 46 Hun, 634.

At common law, the time of the offense must always be alleged, but it is mere form, unless some special reason renders it imperative. 1 Lish. Crim. Proc., § 386; 1 Stark. Crim. Plead. 54; *Turner v. People*, 33 Mich. 363.

The doctrine is general that where time is material, it must, to the extent of such materiality, be alleged correctly and proved as laid. 1 Rish. Crim. Proc., § 399; *Dacy v. State*, 17 Ga. 439; *State v. Caverly*, 51 N. H. 446.

An indictment is good if the day and year can be collected from the whole statement, though not specially averred. *Gill v. People*, 3 Hun, 187; 5 Thomp. & Cook, 308, affirmed 60 N. Y. 643.

The time and place when and where a crime was committed must be stated with certainty in the indictment, but it is not necessary to prove them as stated, unless they are necessary ingredients. *People v. Stocking*, 50 Barb. 573; 33 How. 48; 6 Park. 263.

§ 281. **Statement as to person injured or intended to be injured.**—When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

See *People v. Johnson*, 5 N. Y. Cr. Rep. 219; 104 N. Y. 218; *People v. Dunn*, 35 State Rep. 464; 53 Hun, 387; *People v. Richards*, 5 N. Y. Cr. Rep. 867; 44 Hun, 286; *People v. Clements*, 5 N. Y. Cr. Rep. 287; *Kennedy v. People*, 89 N. Y. 245.

§ 282. **Construction of words used in indictment.**—The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

See *People v. Farrell*, 28 State Rep. 44; *People v. Dunn*, 53 Hun, 385, 387; *People v. Klock*, 48 id. 277; *People v. Wise*, 8 N. Y. Cr. Rep. 306; 2 How. Pr. (N. S.) 96; *People v. Dumar*, 106 N. Y. 510.

§ 283. **Words used in a statute need not be strictly pursued.**—Words used in a statute to define a crime need not be strictly pursued in the indictment; but other words, conveying the same meaning, may be used.

See Rapalje's Crim. Proc., § 90; *People v. Dimick*, 5 N. Y. Cr. Rep. 187; 41 Hun, 621; *People v. Buddensieck*, 4 N. Y. Cr. Rep. 253.

An indictment is good if it follows the language of the statute defining the crime. *People v. Farrell*, 28 State Rep. 44; *People v. Kelly*, 8 N. Y. Cr. Rep. 372; *People v. Weldon*, 111 N. Y. 574; *People v. Smith*, 6 N. Y. Cr. Rep. 472; *People v. Burns*, 53 Hun, 274; *Phelps v. People*, 72 N. Y. 334; *People v. van Pelt*, 4 How. Pr. 36; *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 339.

But this rule presupposes that the statute creating the offense is a **vand exercise of the legislative power.** *People v. West*, 106 N. Y. 295.

The pleader need not use the very words of the statute. *People v. Whedon*, 2 N. Y. Cr. Rep. 320; *Fraser v. People*, 54 Barb. 306; *People v. Jahne*, 103 N. Y. 182. But see *People v. Van Pelt*, 4 How. Pr. 36.

If words of similar import are employed it is sufficient. *Matter of Gray*, 2 N. Y. Cr. Rep. 306; *United States v. Wilson*, 24 Fed. Rep. 286; *Tully v. People*, 67 N. Y. 15.

§ 284. Indictment, when sufficient.—The indictment is sufficient, if it can be understood therefrom :

1. That it is entitled in a court having authority to receive it though the name of the court be not accurately stated ;

2. That it was found by a grand jury of the county, or if in a city court, of the city in which the court was held ;

3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that it has been found impossible to discover his real name ;

4. That the crime was committed at some place within the jurisdiction of the court ; except where, as provided by sections one hundred and thirty-three to one hundred and thirty-eight, both inclusive, the act, though done without the local jurisdiction of the county, is triable therein ;

5. That the crime was committed at some time prior to the finding of the indictment ;

6. That the act or omission, charged as the crime, is plainly and concisely set forth ;

7. That the act or omission, charged as the crime, is stated with such a degree of certainty, as to enable the court to pronounce judgment, upon a conviction, according to the right of the case.

See *People v. Reavey*, 4 N. Y. Cr. Rep. 14; *People v. Buddensieck*, 4 N. Y. Cr. Rep. 251; 5 id. 71; 103 N. Y. 496; *People v. Bowe*, 3 id. 160; *People v. Jackson*, 111 N. Y. 369; *People v. Wise*, 3 N. Y. Cr. Rep. 305; 2 How. Pr. (N. S.) 98; *People v. Conroy*, 97 N. Y. 68; *People v. Bowe*, 34 Hun, 533; *People v. Deevey*, 35 id. 311; *People v. Dunn*, 53 id. 387; *People v. Upton*, 88 id. 113; *People v. Reavey*, id. 421; *People v. Farrell*, 28 State Rep. 44; *People v. Crotty*, 30 id. 45; *People v. Dimick*, 107 N. Y. 80.

An indictment is good if it contains sufficient averment to inform defendant of the nature of the accusation against him, to prepare his defense and to admit of the record as a bar to a second prosecution for the same offense. *People v. Farrell*, 28 State Rep. 44; *Pontius v. People*, 82 N. Y. 389; *Fraser v. People*, 54 Barb. 306; *People v. Dunn*, 7 N. Y. Cr. Rep. 189; 53 Hun, 397.

Notwithstanding the liberality with which indictments may now be construed they must allege facts which show that the crime has been committed. *People v. Haight*, 26 State Rep. 34.

In *People v. Dumar*, 106 N. Y. 509, the court say:

"The indictment, therefore, must charge the crime, and it must also state the act constituting the crime. The omission of either of these things would necessarily be fatal to the indictment. If there was no accusation of a crime, the paper, however formal in other respects, would not be an indictment, and so there would be no criminal action. If it contained no statement of the act constituting the crime, there would be no description of the offense, and neither an acquittal nor a conviction would enable the defendant to withstand a further prosecution for the same crime."

The name of the crime in an indictment is mere matter of form which may or may not be stated, and if stated incorrectly, it does not vitiate or control the character of the crime as against specific allegations of fact in the indictment constituting it. *People v. Sullivan*, 4 N. Y. Cr. Rep. 193, 197.

In *People v. Bliven*, 112 N. Y. 79, it was held that an indictment which charges the defendant with doing the act constituting the crime is sufficient, although the proof shows that he was absent at the time the crime was committed, but that he counseled, induced and procured its commission.

It is well settled in this state, that where an offense may be committed by doing any one of several things the indictment may, in a single count, group them all together and charge the defendant to have committed them all, and a conviction may be had on proof of the committing of any one. *People v. Smith*, 6 N. Y. Cr. Rep. 473; *Bork v. People*, 91 N. Y. 13; 1 N. Y. Cr. Rep. 379; *People v. Davis*, 56 N. Y. 95; *People v. Kelly*, 8 N. Y. Cr. Rep. 272; *People v. West*, 6 id. 382.

If one of several counts in an indictment is good, that is sufficient to sustain a conviction under a general verdict of guilty. *People v. Davis*, 56 N. Y. 95; *People v. Willett*, 102 id. 251; *People v. Dimick*, 107 id. 30; 5 N. Y. Cr. Rep. 187.

§ 285. Indictment not insufficient for defect of form, not tending to prejudice defendant.—No indictment is insufficient nor can the trial, judgment, or other proceedings thereon be affected, by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits.

See *People v. Buddensieck*, 103 N. Y. 496; *People v. Dimick*, 107 id. 29; *People v. Clements*, id. 210; *People v. Weldon*, 111 id. 575; *People v. Willett*, 102 id. 251-4; *Sauser v. People*, 8 Hun, 302; *People v. Haight*, 54 id. 9; *People v. Dunn*, 53 Hun, 387; *People v. Osterhout*, 84 id. 261; 8 N. Y. Cr. Rep. 445; *Sanchez v. People*, 22 N. Y. 150; *Briggs v. People*, 8 Barb. 547; *People v. Fillinger*, 24 How. Pr. 341; *People v. Gregg*, 35 State Rep. 761.

This section is general in its application and is intended to cure defects in form under the general rules of pleading. *People v. Williams*, 18 State Rep. 405.

Though the indictment contains neither the title of the action nor a statement of the court in which it is found and presented, yet if it appear that it is found in the proper court and action, and that no prejudice to defendant can ensue, the court is bound, under this section, to disregard such omissions; *People v. Peck*, 3 N. Y. Cr. Rep. 817.

The name of the crime in an indictment is mere matter of form which may or may not be stated; and if stated incorrectly, it does not vitiate or control the character of the crime as against specific allegations of fact in the indictment constituting it. *People v. Sullivan*, 4 N. Y. Cr. Rep. 194.

§ 286. Presumptions of law and matters of which judicial notice is taken, need not be stated.— Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment.

See Rapalje's Crim. Proc., §§ 238, 239; *People v. Dunn*, 53 Hun, 387.

As to judicial notice, see Moak's Van Santv. Pl. 254; 24 Am. L. Reg. (N. S.) 558; Whart. Ev., § 276; 10 Abb. N. C. 107, note; 49 Am. Rep. 201; 89 Am. Dec. 663, note; 4 L. R. A. 33.

§ 287. Pleading a judgment or determination of, or proceeding before, a court or officer of special jurisdiction.— In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. The facts constituting jurisdiction, however, must be established on the trial.

See *Elghmy v. People*, 79 N. Y. 556; *People v. Burns*, 53 Hun, 587.

§ 288. Private statute, how pleaded.— In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute, by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

See Code of Civ. Procedure, § 530.

§ 289. Pleading in indictment for libel.— An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application of the party libeled, of the defamatory matter on which the indictment is founded; but it is sufficient to state generally, that the same was published concerning him; and the fact that it was so published, must be established on the trial.

Matter not libelous on its face must be rendered so by innuendo; *People v. Isaacs*, 1 N. Y. Cr. Rep. 148.

§ 290. Pleading in indictment for forgery, where the instrument has been destroyed, or withheld by defendant. — When an instrument, which is the subject of an indictment for forgery, has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment, and established on the trial, the misdescription of the instrument is immaterial.

See *People v. Badgley*, 16 Wend. 58; *People v. Kingsley*, 2 Cow. 522.

§ 291. Pleading in indictment for perjury or subornation of perjury. — In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom, the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person where or before whom the perjury was committed.

See *People v. Williams*, 18 State Rep. 403; *Geston v. People*, 4 Lans. 487; 61 Barb. 35; *People v. Robertson*, 3 Wheeler Crim. Cas. 180; *People v. Clements*, 107 N. Y. 205; *Tuttle v. People*, 36 id. 431; *People v. Hoag*, 2 Park. 9; *Burns v. People*, 55 Barb. 531; 5 Lans. 189; *Campbell v. People*, 8 Wend. 636; *O'Reilly v. People*, 9 Abb. N. C. 77; *Harris v. People*, 4 Hun. 1; *Ortner v. People*, id. 323; *People v. Sweetman*, 3 Park. 358; *People v. McKinney*, id. 510; *People v. Warner*, 5 Wend. 272; *People v. Elghmy*, 79 N. Y. 556; *Stratton v. People*, 81 id. 629; *People v. Grimshaw*, 2 N. Y. Cr. Rep. 390.

§ 292. Upon indictment against several, one or more may be convicted or acquitted. — Upon an indictment against several defendants any one or more may be convicted or acquitted.

See 1 Bish. Crim. Proc., §§ 1036, 1625; *Chatterton v. People*, 15 Abb. Fr. 147; *Klein v. People*, 81 N. Y. 229; *Rex v. Hempstead*, Russ. & Ryan, 344.

In indictments for offenses necessarily joint, joint defendants may be convicted of different grades. *Shores v. Com.*, 5 Penn. St. 83; *R. v. Butterworth*, Russ. & Ryan, 520.

Where two defendants are charged with murder in the same indictment, the jury may find one guilty of murder and another of manslaughter. *United States v. Harding*, 1 Wall. Jr. 127; *Mack v. State*, 32 Miss. 406.

If the act is indivisible, such as conspiracy or riots, then one cannot be convicted without the other. *Stephens v. State*, 14 Ohio, 388; *State v. McD.*, 6 Bennet, 272; *Addis*, 334. See *White v. People*, 32 N. Y. 469.

On an indictment against two for a conspiracy to cheat, the judgment should be against each defendant severally and not against them jointly. *March v. People*, 7 Barb. 391.

As to separate trials, § 391, *post*.

CHAPTER III.

AMENDMENT OF THE INDICTMENT.

SECTION 293. When amendment allowed.

294. Trial to proceed.

295. Effect of verdict, etc.

§ 293. **When amendment allowed.** — Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable.

See 1 Bish. Crim. Proc. (3d ed.), § 708; 14 Am. Dec. 585, note; Rapalje's Crim. Proc., § 109; *People v. Jackson*, 111 N. Y. 369; *People v. Petrea*, 92 id. 145; *Matter of Bain*, 121 U. S. 1; *Rex v. Wilkes*, 4 Burr. 2527; *Com. v. Child*, 18 Pick. 200; *Com. v. Mahar*, 16 id. 120; *Com. v. Drew*, 3 Cush. 279; *People v. Campbell*, 4 Park. 387; *State v. Moore*, 24 S. C. 150; 58 Am. Rep. 241.

This section is constitutional. *People v. Johnson*, 104 N. Y. 216; 5 N. Y. Cr. Rep. 217; 4 id. 591; *People v. Herman*, 45 Hun, 176; 27 Week. Dig. 118; *People v. Richards*, 5 N. Y. Cr. Rep. 367; 44 Hun, 286.

An indictment for grand larceny, charging the stealing of "coin," cannot be amended upon the trial, to conform to the proofs, by substituting currency for coin, where the effect of the amendment will be to change the grade of the offense proven from petit to grand larceny. *People v. Poucher*, 30 Hun, 576.

Where, upon a trial for larceny, there is a variance between the allegation and proof as to the owner of the goods alleged to have been stolen, the indictment may be amended in that respect. The name of the owner is no material attribute of the crime charged. *People v. Herman*, 27 Week. Dig. 118; 45 Hun, 176; *State v. Dominique*, 39 La. Ann. 323; *Knight v. State*, 64 Miss. 803.

The indictment charged defendant with having seduced, under promise of marriage, one Mary Oliphant, an unmarried female of previous chaste character. On the trial the first witness called was complainant, who testified that her name was in fact Mary Olivert. *Held*, that there was no error in allowing the

indictment to be amended to conform to the proof. *People v. Johnson*, 104 N. Y. 213. See, also, *State v. Buchanan*, 35 La. Ann. 89; *People v. Hogan*, 37 State Rep. 117.

An amendment of the corporate title of a bank specified in the indictment is authorized by this section. *People v. Dunn*, 53 Hun, 382.

§ 294. **Trial to proceed.** — After such amendment, the trial, whenever the same shall be proceeded with, shall proceed in the same manner and with the same consequences, as if no such variance had occurred.

Cited, People v. Johnson, 104 N. Y. 216; *People v. Jackson*, 111 id. 362; 5 N. Y. Cr. Rep. 217; *People v. Richards*, 44 Hun, 286; 5 N. Y. Cr. Rep. 367; *People v. Herman*, 45 Hun, 176.

§ 295. **Effect of verdict, etc.** — A verdict and judgment, which shall be given after the making of any such amendment, shall be of the same force and effect, as if the indictment had originally been found in its amended form.

Cited, People v. Johnson, 104 N. Y. 216; *People v. Jackson*, 111 id. 369.

CHAPTER IV.

ARRAIGNMENT OF THE DEFENDANT.

SECTION 296. Defendant must be arraigned in the court in which indictment is found, if triable therein, or if not, in that to which it is sent or removed.

297. If indictment be for felony, defendant must be present; if for misdemeanor, he may appear by counsel.

298. When personal appearance is necessary, if defendant be in custody, he must be brought before the court.

299. If discharged on bail or deposit, bench warrant to issue.

300. Bench warrant, by whom and how issued.

301. Form of bench warrant.

302. Direction in bench warrant, if indictment be for misdemeanor.

303. If offense be bailable, order for bail to be indorsed on bench warrant.

304. Bench warrant, how served.

305. Proceedings on bench warrant, when defendant is brought before magistrate of another county.

306. Ordering defendant into custody, or increasing bail, when indictment is for felony.

307. Defendant, if present, to be committed; if not, bench warrant to issue.

308. Defendant appearing for arraignment without counsel, to be informed of his right to counsel.

SECTION 809. Arraignment, how made.

810. If he gave another name, subsequent proceedings to be had by that name, referring to name in the indictment.

811. Time allowed defendant to answer indictment.

812. How defendant may answer indictment.

§ 296. Defendant must be arraigned in the court in which indictment is found, if triable therein, or if not, in that to which it is sent or removed.— When an indictment is filed, the defendant must be arraigned thereon, before the court in which it is found, or before the court to which it is sent or removed.

See 1 Bish. Crim. Proc. (3d ed.), § 728 *et seq.*; 21 How. Pr. 149; 53 Cal. 490; 54 Ind. 159; 31 Mich. 471; 59 Mo. 154; 1 Tex. App. 248, 225.

In a criminal case an arraignment and plea are essential and necessary preliminaries to a legal trial upon an indictment. *People v. Bradner*, 107 N. Y. 9.

Any form of arraignment is sufficient by which the prisoner admits his identity and demands a trial. *People v. Frost*, 5 Park. 52.

There is in this Code no provision for compelling a corporation which has been indicted to appear before the court and plead to the indictment. *People v. Gas-light Co.*, 6 N. Y. Cr. Rep. 189.

When failure to arraign a prisoner affords no ground for reversal of a conviction. *People v. Osterhout*, 34 Hun, 260.

A trial without an arraignment is a nullity. *Sanders v. State*, 97 Ind. 147.

§ 297. If indictment be for felony, defendant must be present; if for misdemeanor, he may appear by counsel.— If an indictment be for a felony, the defendant must be personally present when arraigned; but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel.

No provision of this Code compels a corporation to plead to an indictment. *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 189.

§ 298. When personal appearance is necessary, if defendant be in custody, he must be brought before the court.— When his personal appearance is necessary, if he be in custody, the court may direct the officer in whose custody he is, to bring him before it to be arraigned.

§ 299. If discharged on bail or deposit, bench warrant to issue.— If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear to be arraigned, or if the defendant be for any cause absent when his

personal attendance is necessary, the court, in addition to the forfeiture of any undertaking of bail, or of any money deposited, may direct the clerk to issue a bench warrant for his arrest.

§ 300. Bench warrant, by whom, and how issued.—

The clerk, on the application of the district attorney, may accordingly at any time after the order, whether the court be sitting or not, issue a bench warrant to one or more counties. A bench warrant for the arrest of any defendant indicted may also be issued by the district attorney at any time after the indictment is found.

§ 301. Form of bench warrant.— The bench warrant issued upon the indictment must, if the crime be a felony, be substantially in the following form :

“County of Albany [or as the case may be].

“In the name of the people of the state of New York :

To any peace officer in this state. An indictment having been found on the day of , eighteen hundred and , in the court of sessions of the county of Albany [or as the case may be], charging C. D. with the crime of [designating it generally].

“You are therefore commanded, forthwith to arrest the above-named C. D., and bring him before that court [or if the indictment have been sent or removed to another court], before the court of oyer and terminer of that county [or as the case may be] to answer the indictment ; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of Albany [or, as the case may be, or in the city or county of New York, to the keeper of the city prison of the city of New York].

City [or town] of , the day of ,
eighteen hundred and

“By order of the court.

E. F., *Clerk*, or

G. H., *District Attorney of the county*
of

Relates only to bench warrants issued by the clerk, and not to such as are issued by the district attorney himself. *People, ex rel. Sherwin, v. Mead*, 28 Han, 227; affirmed, 92 N. Y. 415.

§ 302. Direction in bench warrant if indictment be for misdemeanor. — If the crime be a misdemeanor, the bench warrant must be in a similar form, adding to the body thereof a direction to the following effect: "Or if he require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment."

See *People, ex rel. Sherwin, v. Mead*, 28 Hun, 227; 64 How. Pr. 41, 252; 92 N. Y. 415.

§ 303. If offense be bailable, order for bail to be indorsed on bench warrant. — If the crime charged be bailable, the court, upon directing the bench warrant to issue, may fix the amount of bail; and in such case an indorsement must be made upon the bench warrant and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of dollars."

§ 304. Bench warrant, how served. — The bench warrant may be served in any county, in the same manner as a warrant of arrest, except, that when served in another county, it need not be indorsed by a magistrate of that county.

§ 305. Proceedings on bench warrant when defendant is brought before magistrate of another county. — If the defendant be brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto, in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings may be had thereon, as provided in sections one hundred and fifty-nine to one hundred and sixty-one, both inclusive.

§ 306. Ordering defendant into custody, or increasing bail, when indictment is for felony. — If the defendant, before the finding of an indictment, has given bail for his appearance to answer the charge, the court, to which the indictment is presented or sent or removed for trial, may order the defendant to be committed to actual custody, either without bail, or unless he give bail in an increased amount, to be specified in the order.

§ 307. Defendant, if present, to be committed; if not, bench warrant to issue. — If the defendant be present when

the order is made, he must be forthwith committed accordingly. If he be not present, a bench warrant must be issued and proceeded upon, in the manner provided in this chapter.

§ 308. **Defendant appearing for arraignment without counsel, to be informed of his right to counsel.**—If the defendant appear for arraignment, without counsel, he must be asked if he desire the aid of counsel, and if he does, the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death, the court in which the defendant is tried may, in its discretion, and upon satisfactory proof that such defendant is wholly destitute of means, award to such counsel reasonable compensation for his services which shall be a charge upon the county in which the indictment in the action is found, to be paid out of the proper fund upon the certificate of the judge or justice presiding at the trial.

In effect, as amended, Sept. 1, 1893; Laws 1893, ch. 521.

Where counsel assigned by the court to defend a prisoner deposes that a proper discharge of his duties requires an appeal, the court should provide the proper means for that purpose, and in a proper case will direct that at the expense of the county a copy of the stenographer's minutes on the trial shall be made, to which the prisoner's counsel may have access. *People v. Willett*, 3 N. Y. Cr. Rep. 54; 1 How. Pr. (N. S.) 197.

Counsel assigned to defend prisoners is not entitled to compensation from the county for his services rendered under such assignment. *People, ex rel. Brown, v. Supervisors of Onondaga County*, 4 N. Y. Cr. Rep. 102; 3 How. Pr. (N. S.) 6; *People, ex rel. Ransom, v. Board, etc.*, 78 N. Y. 622; *People, ex rel. Hadley, v. Supervisors*, 28 How. Pr. 22.

§ 309. **Arraignment, how made.**—The arraignment must be made by the court, or by the clerk or district attorney, under its direction, and consists in stating the charge in the indictment to the defendant, and in asking him whether he pleads guilty or not guilty thereto. If the defendant demand it, the indictment must be read, or a copy thereof furnished to him before requiring him to plead.

Cited, *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 190.

In *People v. Frost*, 6 Park. 54, the court say: "Sir William Blackstone says (4 Com. 322): 'To arraign is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him in the indictment.' 2 Hale P. C. 116. When brought to the bar he is called upon by name to hold up his hand. 'However,' adds the learned writer, 'it is not an indispensable ceremony, for being calculated for the purpose of identifying the person, any other acknowledgment will answer the purpose as well.'" See 1 Bish. Crim. Proc. (3d ed.), § 728 *et seq.*; *People v. Bradner*, 107 N. Y. 9.

§ 310. **If he gave another name, subsequent proceedings to be had by that name, referring to name in the indictment.**—If when arraigned the defendant allege that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment; and the subsequent

proceedings on the indictment may be had against him, by that name, referring also to the name by which he is indicted.

Cited, People v. Bradner, 107 N. Y. 1.

§ 311. Time allowed defendant to answer indictment.— If, on the arraignment, the defendant require it, he must be allowed until the next day, or such further time may be allowed him as the court deems reasonable, to answer the indictment.

§ 312. How defendant may answer indictment.— In answer to the indictment, the defendant may either move the court to set the same aside, or may demur or plead thereto.

See *People v. Petrea*, 92 N. Y. 128, 145; *People v. Clements*, 5 N. Y. Cr. Rep. 292; *People v. Price*, 6 id. 143.

A motion to set aside an indictment cannot be made until the defendant is arraigned thereupon. *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 189. See § 815, *post*.

If the indictment is lost after plea, the trial may proceed on a copy. *Schultz v. State*, 15 Tex. App. 258; 49 Am. Rep. 194; *State v. Gardner*. 18 Lea, 184; 49 Am. Rep. 660.

CHAPTER V.

SETTING ASIDE THE INDICTMENT.

MOTION 813. Indictment, when set aside on motion.

814. Defendant, when precluded from objecting to indictment in any other manner.

815. Motion, when heard.

816. If denied, defendant must immediately demur or plead.

817. If granted, defendant discharged, unless the case be submitted to the same or another grand jury.

818. Effect of order for re-submission.

819. When new indictment not found.

820. Order to set aside indictment, no bar to another prosecution

§ 313. Indictment, when set aside on motion.— The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases:

1. When it is not found, indorsed and presented as prescribed in sections two hundred and sixty-eight and two hundred and seventy-two;

2. When a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration, except as provided in sections two hundred and sixty-two, two hundred and sixty-three and two hundred and sixty-four.

See *People v. Bradner*, 107 N. Y. 1; *People v. Petrea*, 92 id. 145; 80 Hun, 98, 101; 64 How. Pr. 139.

A defendant in moving to set aside an indictment is not confined to the grounds specified in this section. *People v. Clements*, 5 N. Y. Cr. Rep. 288; *People v. Price*, 6 id. 141, 145, note. *Contra*, *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 189.

The provisions of this section have reference only to motions based on the grounds therein stated, and require the motions based on those grounds be made before pleading to the indictment. *People v. Clements*, 5 N. Y. Cr. Rep. 288.

A defendant cannot compel the exhibition to himself or his counsel, of the minutes of the grand jury, or the testimony of the people's witnesses before it, for any other purpose than to enable him to set aside the indictment on the grounds specified in this section. *People v. Richmond*, 5 N. Y. Cr. Rep. 97.

§ 314. Defendant, when precluded from objecting to indictment in any other manner.—If the motion to set aside the indictment be not made, the defendant is precluded from afterward taking the objections mentioned in the last section.

§ 315. Motion, when heard.—The motion to set aside an indictment must be heard at the time of the arraignment, unless, for good cause, the court postpone the hearing to another time.

A motion to set aside an indictment cannot be made until the defendant is arraigned thereupon. *People v. Gas-light Co.*, 6 N. Y. Cr. Rep. 189.

§ 316. If denied, defendant must immediately demur or plead.—If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto.

§ 317. If granted, defendant discharged, unless the case be submitted to the same or another grand jury.—If the motion be granted, the court must order that the defendant, if in custody, be discharged therefrom, or if under bail, that his bail be exonerated, or if he have deposited money instead of bail, that the money be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury.

See *People v. Clements*, 5 N. Y. Cr. Rep. 289, 297.

§ 318. **Effect of order for re-submission.**—If the court direct that the case be re-submitted, the defendant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money have been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

See *People v. Clements*, 5 N. Y. Cr. R.p. 299; *People v. Price*, 6 id. 145.

§ 319. **When new indictment not found.**—Unless a new indictment be found, before the next grand jury of the county or city is discharged, the court must, on the discharge of such grand jury, make the order prescribed by section three hundred and seventeen.

§ 320. **Order to set aside indictment no bar to another prosecution.**—An order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense.

CHAPTER VI.

DEMURRER.

SECTION 821. Only pleading for defendant, is demurrer or plea.

822. Demurrer or plea, when put in.

823. Grounds of demurrer.

824. Demurrer, how put in, and its form.

825. When heard.

826. Judgment on demurrer.

827. If allowed, judgment a bar to another prosecution, unless direction that the case be re-submitted to the same or another grand jury.

828. If re-submission not ordered, defendant discharged.

829. Proceedings, if re-submission ordered.

830. If demurrer disallowed, defendant may be permitted to plead; when he must do so, and effect of his omission.

831. When objections, forming ground of demurrer, may be taken at the trial, or in arrest of judgment.

§ 321. **Only pleading for defendant, is demurrer or plea.**—The only pleading on the part of the defendant is either a demurrer or a plea.

See 1 Bish. Crim. Proc., § 775; *People v. Petrea*, 92 N. Y. 128; *People v. Conway*, 97 id. 63, 70; *People v. Bradner*, 107 id. 9.

§ 322. **Demurrer or plea, when put in.**—Both the demurrer and the plea must be put in, either at the time of the arraignment, or at such other time as may be allowed to the defendant for that purpose.

See 1 Bish. Crim. Proc., § 775.

323. **Grounds of demurrer.**—The defendant may demur to the indictment, when it appears upon the face thereof :

1. That the grand jury, by which it was found, had no legal authority to inquire into the crime charged, by reason of its not being within the local jurisdiction of the county ; or

2. That the indictment does not conform substantially to the requirements of sections two hundred and seventy-five and two hundred and seventy-six ; or

3. That more than one crime is charged in the indictment within the meaning of sections two hundred and seventy-eight or two hundred and seventy-nine ; or

4. That the facts stated do not constitute a crime ; or

5. That the indictment contains matter, which, if true, would constitute a legal justification or excuse for the acts charged, or other legal bar to the prosecution.

See *People v. Clements*, 107 N. Y. 210; *People v. Conway*, 97 id. 63; 2 N. Y. Cr. Rep. 577; 20 Week. Dig. 244; *People v. Richards*, 44 Hun, 288; 5 N. Y. Cr. Rep. 370; *People v. Carr*, 3 id. 582; *People v. Cooper*, id. 119; *People v. Wise*, id. 304; *People v. Cole*, 2 id. 110; *People v. Peck*, id. 317; *People v. Durrin*, id. 334; *People v. Upton*, 38 Hun, 107; 4 N. Y. Cr. Rep. 455; *People v. Menken*, 36 Hun, 99; 3 N. Y. Cr. Rep. 233; *People v. O'Donnell*, 46 Hun, 360.

§ 324. **Demurrer, how put in, and its form.**—The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it may be disregarded.

See *People v. McCarthy*, 110 N. Y. 314.

§ 325. **When heard.**—Upon the demurrer being filed, the objections presented thereby must be heard at such time as the court may appoint.

§ 326. **Judgment on demurrer.**—The court must give judgment upon the demurrer, either allowing or disallowing it; and an order to that effect must be entered upon the minutes.

See *People v. Cooper*, 3 N. Y. Cr. Rep. 119.

§ 327. If allowed, judgment a bar to another prosecution, unless direction that the case be re-submitted to the same or another grand jury. — If the demurrer be allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, direct the case to be re-submitted to the same or another grand jury.

See *People v. Richards*, 44 Hun, 288; 5 N. Y. Cr. Rep. 370; *People v. Clements*, id. 297.

§ 328. If re-submission not ordered, defendant discharged. — If the court do not direct the case to be re-submitted the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he have deposited money instead of bail, the money must be refunded to him.

See §§ 317, 318, *ante*; *People v. Petrea*, 92 N. Y. 128, 144; *People v. Clements*, 5 N. Y. Cr. Rep. 297; *People v. O'Donnell*, 46 Hun, 363.

§ 329. Proceedings, if re-submission ordered. — If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in sections three hundred and eighteen and three hundred and nineteen.

See *People v. Petrea*, 92 N. Y. 128, 145.

§ 330. If demurrer disallowed, defendant may be permitted to plead; when he must do so, and effect of his omission. — If the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow. If he do not plead, judgment must be pronounced against him, if the crime charged is a misdemeanor, otherwise a plea of "not guilty" must be entered.

See § 342, *post*; *People v. Persons*, 2 N. Y. Cr. Rep. 114; *People v. Cooper*, 3 id. 119; *People v. Crotty*, 30 State Rep. 46.

§ 331. When objections, forming ground of demurrer, may be taken at the trial or in arrest of judgment. — The objections mentioned in section three hundred and twenty-three can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty, and in arrest of judgment.

See *People v. McCarthy*, 110 N. Y. 314; *People v. Buddensieck*, 103 id. 497; 5 N. Y. Cr. Rep. 71; 4 id. 230, 252; *People v. Upton*, 38 Hun, 110, 111; *People v. Kelly*, 31 id. 226; 2 N. Y. Cr. Rep. 18; *People v. Osterhout*, 34 Hun, 262; *People v. Mencké*, 3 N. Y. Cr. Rep. 233; *People v. Stevens*, id. 582.

CHAPTER VII.

PLEA.

SECTION 332. The different kinds of pleas.

333. Plea, how put in.

334. Its form.

335. Plea of guilty, how put in.

336. Plea of insanity.

337. Plea may be withdrawn by permission of the court.

338. What is denied by a plea of not guilty.

339. What may be given in evidence under it.

340, 341. What is deemed a former acquittal.

342. If defendant refuse to answer indictment, plea of not guilty to be entered.

§ 332. **The different kinds of pleas.**— There are three kinds of pleas to an indictment; a plea of (1) guilty, (2) not guilty, (3) a former judgment of conviction or acquittal of the crime charged, which may be pleaded either with or without the plea of guilty. But no conviction shall be had upon a plea of guilty in either of the following cases: (a) where the crime charged is or may be punishable by death, or (b) where the crime charged is or may be punishable by imprisonment in a state prison for the term of life.

See *People v. Oignarale*, 110 N. Y. 29; *People v. Petrea*, 92 id. 128, 145; 30 Hun, 98, 101.

§ 333. **Plea, how put in.**— Every plea must be oral, and must be entered upon the minutes of the court.

See *People v. Petrea*, 30 Hun, 98, 101; *People v. O'Neil*, 47 Hun, 157; *People v. Osterhout*, 34 id. 262.

As to standing mute, see note to § 342, *post*.

§ 334. **Its form.**— The plea must be entered in substantially the following form:

1. If the defendant plead guilty to the crime charged in the indictment, "the defendant pleads that he is guilty;"

2. If he plead guilty to any lesser crime than that charged in the indictment, "the defendant pleads guilty to the crime of" — (naming it).

3. If he pleads not guilty, "the defendant pleads not guilty."

4. If he plead a former conviction or acquittal: "The defendant pleads, that he has already been convicted (or acquitted, as the case may be), of the crime charged in this indictment, by the judgment of the court of — (naming it), rendered at — (naming the place), on the — day of —."

§ 335. Plea of guilty, how put in.— A plea of guilty can only be put in by the defendant himself in open court, except upon an indictment against a corporation, in which case it may be put in by counsel.

See 1 Bish. Crim. Proc., § 794a.

There is no provision of this Code which compels a corporation to plead to an indictment. *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 189.

A plea of guilty obtained by duress or fraud is a nullity. *Sanders v. State*, 97 Ind. 147; 4 Crim. L. Mag. 359.

§ 336. Plea of insanity.— Whenever a person in confinement under indictment desires to offer the plea of insanity, he may present such plea at the time of his arraignment, as a specification under the plea of not guilty.

See 2 Crim. L. Mag. 612; *People v. McElvaine*, 125 N. Y. 596.

§ 337. Plea may be withdrawn by permission of the court.— The court may, in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.

See "Withdrawal of Plea of Guilty," 11 Crim. L. Mag. 479; *People v. Joyce*, 4 N. Y. Cr. Rep. 348; *Com. v. Mahoney*, 115 Mass. 151; *Pattie v. State*, 109 Ind. 545; *State v. Oehlslager*, 38 Iowa, 297.

§ 338. What is denied by a plea of not guilty.— The plea of not guilty is a denial of every material allegation in the indictment.

See § 331, *ante*; *People v. Bradley*, 33 State Rep. 565.

Former conviction cannot be given under a plea of not guilty. *People v. Benjamin*, 2 Park. 201.

§ 339. What may be given in evidence under it.—All matters of fact, tending to establish a defense, other than that specified in the third subdivision of section three hundred and thirty-two, may be given in evidence under the plea of not guilty.

See *People v. Cignarale*, 110 N. Y. 29; *People v. Durrin*, 2 N. Y. Cr. Rep. 333.

§ 340. What is deemed a former acquittal.—If the defendant were formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment were dismissed upon an objection to its form or substance, without a judgment of acquittal, it is not deemed an acquittal of the same offense.

An acquittal on the ground of variance between the indictment and proof is not sufficient where the variance consisted in a failure to establish the particular offense charged. *Canter v. People*, 1 Abb. Dec. 305.

§ 341. What is deemed a former acquittal.—When, however, the defendant was acquitted on the merits, he is deemed acquitted of the same offense, notwithstanding a defect in form or substance in the indictment on which he was acquitted.

It must appear that the defendant was put in jeopardy by the former trial. *Canter v. People*, 1 Abb. Dec. 305. See *People v. Barrett*, 1 Johns. 66.

A former acquittal, though upon a defective indictment, may be pleaded in bar. In the absence of proof to the contrary, it will be presumed to have been upon the merits. *Croft v. People*, 15 Hun, 484.

§ 342. If defendant refuse to answer indictment, plea of not guilty to be entered.—If the defendant refuse to answer an indictment by demurrer or plea, a plea of not guilty must be entered.

See Abbott's Crim. Brief, 18; *People v. Osterhout*, 34 Hun, 262; 3 N. Y. Cr. Rep. 445; *Reg. v. Bernard*, 1 Fost. & Fin. 240; *United States v. Berger*, 19 Blatchf. 249; *Ellenwood v. Com.*, 10 Metc. 222; *Com. v. McKenna*, 125 Mass. 397.

As to standing mute, see 4 Bl. Com. 435; 2 Hawk. P. C., chap. 30, § 14; 1 Chit. Crim. Law, 424; 1 East P. C. 135; 3 Am. Jur. 158; *Reg. v. Berry*, 1 Q. B. D. 447; 17 Eng. Rep. 107; *Matter of Smith*, 3 Crim. Law Mag. 337.

CHAPTER VIII.

REMOVAL OF THE ACTION, BEFORE TRIAL.

Section 343. Existing writs and proceedings, to remove indictment before trial abolished.

344. When, and in what case, indictment may be removed before trial.

345. If former trial were had, indictment may be removed before the new trial.

346. Application for removal, how made.

347. Stay of trial, how obtained, to enable defendant to apply for removal.

348. Decision on application for stay, to be indorsed on papers and filed.

349. If application for stay be denied, no other application can be made.

350. Violation of last section a misdemeanor and contempt, and order of removal to be vacated.

351. Order of removal to be filed, and pleadings and proceedings to be transmitted.

352. Proceedings on removal, if defendant be in custody.

353. Order for removal must be filed, before a juror is sworn
Authority of the court to which indictment is removed.

§ 343. Existing writs and proceedings, to remove indictment before trial abolished.—All writs and other proceedings heretofore existing, for the removal, upon the application of the defendant, of criminal actions prosecuted by indictment, from one court to another before trial, are abolished.

See Abbott's Crim. Brief, § 67.

The district attorney may remove a criminal cause to the supreme court as a matter of course and of right. *People v. Vermilyea*, 7 Cow. 109, 140-141; *People v. Baker*, 3 Park. 187, 188, 191; 3 Abb. Pr. 42; *Baker v. Munro*, 6 Cow. 396; 1 Chit. Crim. Law (5th Am. ed.), 378, note 1.

"The writ of *certiorari* is demandable as of right by the crown (*R. v. Eaton*, 2 T. R. 89), and issues as of course where the attorney-general or other officer of the crown applies for it, either as a prosecutor or as conducting the defense on behalf of the crown (*Id.*; *R. v. Lewis*, 4 Burr. 2458), and this even though the *certiorari* be expressly taken away by statute; for, unless named, the crown is not bound by statute." Arch. Cr. Pl. & Ev. (17th Eng. ed.) 95; *Com. v. Capp*, 48 Penn. St. R. 58, 56.

"The writ of *certiorari* is demandable of absolute right only by the king himself, and to him the court is bound to grant it (4 Burr. 2458; 2 T. R. 89; Hawk., b. 2, chap. 27, § 27; 1 East, 303, note *d*; Hand's Prac. 37; Dick. Sess. 383); and, therefore, when it is applied for by the attorney-general or other officer of the crown, either as a prosecutor, or when he takes up the defense

of the party indicted on account of his being an officer of the crown or for some other reason, it must issue as a matter of course, and the court has no discretion to exercise (4 Burr. 2458; 1 East, 808, note *d*; Hand's Prac. 87; *Rez v. Thomas*, Mich. Term, 1815), and even where a statute takes away the *certiorari* it does not extend to the crown (2 Chit. Rep. 186)." 1 Chit. Crim. Law (5th Am. ed.), 378.

Hawkins says (2 Hawk. Pleas Crown, Curwood's ed., p. 401, § 27): "SEC. 27. It hath been adjudged that wherever a *certiorari* is by law grantable for an indictment the court is bound of right to award it at the instance of the king, because every indictment is the suit of the king, and he has a prerogative of suing it in what court he pleases. But it seems to be agreed that it is left to the discretion of the court either to grant or deny it at the prayer of the defendant."

"The application for the *certiorari*, whether to a court or judge, except when made by the attorney-general, should be supported by an affidavit stating the grounds for it. As to what grounds are sufficient, see *ante*, 625; *R. v. Inhabitants of Clare*, 4 Burr. 2458; *R. v. Stannard*, 4 T. R. 161; *R. v. Burgess*, 1 Kenyon, 135;" 1 Burn's Justice (30th ed.), 634.

"And general words in an act taking away the *certiorari* will not bind the crown unless such an intention is to be collected from other parts of the act. *R. v. Allen*, 15 East, 333, 342; *R. v. Anon*, 2 Chitty, 186; *R. v. Habe*, 5 T. R. 542; *R. v. Davies*, id. 626; *R. v. Cumberland*, 6 id. 194;" 1 Burn's Justice (30th ed.), 618; *Queen v. Spencer*, 9 Ad. & Ell. 485; 86 Eng. C. L. R. 264.

"The rule that a statute taking away *certiorari* does not bind the crown unless named, is not limited to cases where the crown has an actual interest, but extends to all prosecutions in the name of the king." *The King v. Boulton*, 4 Ad. & Ell. 493; 31 Eng. C. L. R. 226. See, also, *People v. Herkimer*, 4 Cow. 346.

Notice of the application need not be given to defendant. *People v. Carolin*, 115 N. Y. 658; *People v. Vail*, 6 Abb. N. C. 211.

§ 344. When, and in what cases, indictment may be removed before trial. — A criminal action, prosecuted by indictment, may, at any time before trial, on the application of the defendant, be removed from the court in which it is pending, as provided in this chapter, in the following cases:

1. From a court of sessions or a city court, to the court of oyer and terminer of the same county, for good cause shown;

2. From a court of oyer and terminer or sessions, or a city court to the court of oyer and terminer of another county, on the ground that a fair and impartial trial cannot be had in the county or city where the indictment is pending.

5 N. Y. Cr. Rep. 160, note; Abbott's Crim. Brief, 38. See *People, ex rel., v. Oyer and Terminer*, 101 N. Y. 251; 4 N. Y. Cr. Rep. 75; 3 How. Pr. (N. S.) 418; *People v. Squire*, 1 N. Y. State Rep. 534; 4 N. Y. Cr. Rep. 444; *People v. Wilbeck*, 1 Alb. L. J. 195; *McFarland's Case*, 7 Abb. Pr. (N. S.) 348.

At common law the venue in a criminal case may be changed on application of the prisoner. *State v. Albee*, 61 N. H. 423; 60 Am. Rep. 325.

An order changing the place of trial in a criminal action on the ground of the disqualification of the judge, is without jurisdiction and void. *People v. McGarvey*, 56 Cal. 327.

"A statute allowing a change of venue is not void as conflicting with the constitutional right to be tried in the county where the prisoner is indicted. 1 Bish. Crim. Proc., § 50; *Dula v. State*, 8 Yerg. 511; *Petteet v. People*, 70 Ill. 171. But the change can only be made with his consent. *State v. Denton*, 6 Cold. 539; *Wheeler v. State*, 24 Wis. 52; *Dongan v. State*, 30 Ark. 41; *Cochrane v. State*, 6 Md. 400; *Bramlett v. State*, 31 Ala. 376; *State v. Gut*, 13 Minn. 341; *Gut v. State*, 9 Wall. 35; 1 Bish. Crim. Law, §§ 995-998; Cooley Const. Lim. 319, and note." Smith, J., in *State v. Albee*, 61 N. H. 423; 60 Am. Rep. 325.

In *People v. Rourke*, 11 Abb. N. C. 89, it was held that the facts, that an indictment was found in the court of sessions, raises a constitutional question which has been decided by that court upon a motion to quash; that the law does not prescribe a maximum punishment for the offense charged, and that owing to local excitement there will be difficulty in procuring a fair trial, do not present grounds which authorize its removal to the court of oyer and terminer of the same county for trial.

If a defendant desires a change of place of trial of a criminal action by reason solely of newspaper denunciation, he must, especially where the place of publication of said newspapers is a large city, where the choice of jurors is great and varied, show that this denunciation has had some effect by way of popular expression prejudicial to his rights. *People v. Sharp*, 5 N. Y. Cr. Rep. 155.

In deciding an application for changing the place of trial, the court should be governed by the facts shown and not by the impressions and conclusions of witnesses and parties. *People v. Railroad Co.*, 4 Park. 602; 16 How. Pr. 106.

The venue will not be changed upon affidavits expressing mere belief that the prisoner cannot obtain a fair and impartial trial in the county where the indictment is found. *People v. Bodine*, 7 Hill, 147; *People v. Sammis*, 3 Hun, 560.

But the affidavits must set forth the facts and circumstances so that the court may judge whether the application is well founded. *People v. Bodine*, 7 Hill, 147; *People v. Sammis*, 3 Hun, 560.

It is a sufficient reason for changing the place of trial that a fair and impartial trial cannot be had in the county in which the venue is laid. *People v. Long Island R. Co.*, 4 Park. 602; 16 How. Pr. 106.

To entitle a defendant to a removal of a criminal action to another county he must make out a clear and convincing case that by reason of popular passion or prejudice he cannot have a fair trial in a county where the venue is laid. *People v. Sharp*, 5 N. Y. Cr. Rep. 155; *People v. Sammis*, 3 Hun, 560; *People v. Vermilyea*, 7 Cow. 139; *People v. Bodine*, 7 Hill, 147. See, also, 5 N. Y. Cr. Rep. 160, note; 25 W. L. Bull. 366.

Ordinarily, where the place of trial is changed in a criminal case, an adjoining county should be selected. *People v. Baker*, 3 Park. 181; 3 Abb. Pr. 42.

But if the necessity which requires the change calls for it, a more remote county may be designated. *People v. Baker*, 3 Park. 181; 3 Abb. Pr. 42.

§ 345. If former trial were had, indictment may be removed before the new trial.—If one or more trials be had, and a new trial is necessary, either by reason of the discharge of a jury without a verdict, or of the granting of a new trial, the removal may be allowed at any time before the new trial.

§ 346. Application for removal, how made.—The application for the order of removal must be made to the supreme court, at a special term in the district, upon notice of at least ten days to the district attorney of the county where the indictment is pending, with a copy of the affidavits or other papers on which the application is founded.

See *People v. Baker*, 3 Park. 181.

The granting of an order for removal rests in the sound discretion of the court. *People v. Sessions*, 10 Abb. N. C. 192; 62 How. 415.

Where the questions urged as a ground for removal have already been passed upon by the court having present jurisdiction, an order of removal will not be granted. *People v. Bourke*, 11 Abb. N. C. 89; distinguished, *People v. Clark*, 5 N. Y. L. J. 243.

§ 347. Stay of trial, how obtained to enable defendant to apply for removal.—To enable the defendant to make the application, a judge of the supreme court may, in his discretion, upon good cause shown by affidavit, make an order staying the trial of the indictment, until the application can be made and decided.

The application should ordinarily be upon notice to the district attorney; and the affidavit should state with precision and accuracy the exact situation of the indictment, the steps already taken in the court from which removal is sought, and the supposed intended action in each court, while the application is being made. *People v. Bourke*, 11 Abb. N. C. 89.

§ 348. Decision on application for stay, to be indorsed on papers and filed.—When an application for an order to stay the trial is made to the supreme court, it must indorse its decision on the affidavits or other papers presented, and cause them to be immediately filed with the clerk of the court in which the indictment is pending.

§ 349. If application for stay be denied, no other application can be made.—If the application for an order to stay the trial has been made before one judge and denied, a similar application cannot be made to another judge.

§ 350. **Violation of last section a misdemeanor and contempt, and order of removal to be vacated.**—A violation of the last section is punishable not only as a misdemeanor but as a contempt of the court in which the indictment is pending; and that court must vacate an order of removal made in violation thereof.

See *People, ex rel., v. Court of Oyer and Terminer*, 101 N. Y. 251; 4 N. Y. Cr. Rep. 75.

§ 351. **Order of removal to be filed, and pleadings and proceedings to be transmitted.**—If the supreme court order the removal of the action, a certified copy of the order for that purpose must be delivered to and filed with the clerk of the court where the indictment is pending, who must thereupon transmit the same, with the pleadings and proceedings in the action, including all undertakings for the appearance of the defendant or of the witnesses, or a certified copy of the same, to the court to which the action is removed.

§ 352. **Proceedings on removal, if defendant be in custody.**—If the defendant be in custody, and the removal be to the court of oyer and terminer of another county than that where the indictment is pending, the order must provide for the removal of the defendant, by the sheriff of the county where he is imprisoned, to the custody of the proper officer of the county to which the action is removed, and he must be forthwith removed accordingly.

§ 353. **Order for removal must be filed before a juror is sworn; authority of the court to which indictment is removed.**—An order for the removal of the action is of no effect unless a certified copy thereof be filed, as required by section three hundred and fifty-one, before a juror is sworn to try the indictment. When thus filed, the court to which the action is removed must proceed to trial and judgment therein.

TITLE VI.

OF THE PROCEEDINGS ON THE INDIOTMENT, BEFORE TRIAL.

- CHAPTER I. The mode of trial.
II. Formation of the trial jury.
III. Challenging the jury.

CHAPTER I.

THE MODE OF TRIAL.

- SECTION 354. Issue of fact defined.
355. How tried.
356. Appearance.
357. Preparation for trial.

§ 354. Issue of fact defined.— An issue of fact arises,

1. Upon a plea of not guilty ; or
2. Upon a plea of a former conviction or acquittal of the same crime.

§ 355. How tried.— An issue of fact must be tried by a jury of the county in which the indictment was found, unless the action be removed, by order of the supreme court, into the court of oyer and terminer of another county, as provided in the second subdivision of section three hundred and forty-four.

The provisions of the sixth amendment to the Federal Constitution, that " In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," etc., relates only to proceedings in the federal courts. *People v. Penhollow*, 42 Hun, 103; *People v. Williams*, 35 id. 518; *Twitchell v. Com.*, 7 Wall. 321; *Withers v. Buckley*, 20 How. (U. S.) 84, 90, 91; *Walker v. Sawoinet*, 92 U. S. 90; *U. S. v. Cruikshank*, id. 542; *Joseph v. Bidwell*, 28 La. Ann. 382; 26 Am. Rep. 102; *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 388.

Article 1, section 2 of the State Constitution provides:

" The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

The jury intended is a common-law jury of twelve men. *People v. Wynhamer*, 13 N. Y. 378; *Harris v. People* (Ill.), 40 Alb. L. J. 28; *People v. Clark*, 33 Hun, 376.

The word " heretofore," in this clause of the constitution of 1846, means before 1846, and not simply before 1777; *People v. Wynhamer*, 13 N. Y. 378.

A corporation is entitled to a jury wherever an individual is. *People, ex rel. Baldwin, v. Howe*, 37 Barb. 440.

In this state a trial by twelve jurors cannot legally be waived by the prisoner in a criminal case. *People v. Cancomi*, 18 N. Y. 128. See, also, Abbott's Crim. Brief, 88; Cooley Const. Lim. 319; *State v. Carman*, 63 Iowa, 180; 50 Am. Rep. 741; *State v. Kaufman*, 51 Iowa, 578; 33 Am. Rep. 148; 20 Alb. L. J. 291; *State v. Davis*, 66 Mo. 684; 27 Am. Rep. 387; *Harris v. People*, 15 Am. St. 153.

In a criminal prosecution it is the right of the accused to require the charge to be proved in the vicinity or neighborhood where the fact happened. *Com. v. Parker*, 2 Pick. 550, 553; *Com. v. Costley*, 118 Mass. 1; *State v. Albee*, 61 N. H. 423; 60 Am. Rep. 325, 327, and cases cited. See, also, *Swart v. Kimball*, 44 Mich. 443; *Blake v. Everman*, 56 Hun, 453.

An accessory can only be indicted and tried in the county where his offense was committed although the principal offense was committed in another county. *People v. Hall*, 57 How. Pr. 342, 347-348.

§ 356. **Appearance.**—If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if the indictment be for a felony, the defendant must be personally present.

See § 297, *ante*, §§ 427, 434, *post*; 11 Crim. L. Mag. 178.

One indicted for felony must sit in the dock during trial, unless on bail. *Tucker's Case*, 5 C. H. Rec. 164.

A prisoner tried for felony must be present at the impaneling of the jury. *State v. Smith*, 90 Mo. 87; 59 Am. Rep. 4.

The judgment record of a conviction for felony need not show the constant presence of the prisoner during trial. *Stephens v. People*, 19 N. Y. 549; 4 Park. 396.

During a trial for felony the prisoner stepped to an ante-room, connecting with the court-room by swinging doors and only fifteen or twenty feet distant, to telephone to a witness, and was absent five minutes. This was against the district attorney's objection. During such absence the prisoner's counsel continued the cross-examination of a witness. *Held*, not a violation of the requirement that the prisoner shall "be personally present during the trial." *People v. Bragle*, 10 Abb. N. C. 300; 63 How. Pr. 143; 88 N. Y. 535; 42 Am. Rep. 269.

It is error to refuse to allow the prisoner with his counsel to accompany the jury when they view the scene of the alleged crime, under section 411 of this Code. *People v. Palmer*, 5 N. Y. Cr. Rep. 106; 43 Hun, 407. But see *People v. Bonney*, 19 Cal. 426.

If, after the jury have retired for deliberation, they return into court and ask certain questions as to the evidence, it is error in the court to answer the same in the absence of the prisoner. He is entitled to be personally present when any instruction is given to the jury having a tendency to influence the verdict. *Maurer v. People*, 43 N. Y. 1.

The personal presence of the defendant is not necessary on the argument or at the decision of the appellate court. *People v. Clark*, 1 Park. 360.

A defendant indicted for a misdemeanor cannot be tried in his absence, unless he has unequivocally waived his right, and given express authority to his attorney to submit to such trial. *People v. Wilkes*, 5 How. Pr. 105.

On a motion to quash it is not necessary that the defendant be present in court during the argument. *People v. Vail*, 57 How. Pr. 81; 6 Abb. N. C. 206.

§ 357. **Preparation for trial.**—After his plea, the defendant is entitled to at least two days to prepare for his trial, if he require it.

CHAPTER II.

FORMATION OF THE TRIAL JURY.

SECTION 358. Jurors in criminal courts.

§ 358. **Jurors in criminal courts.**—The trial jury is formed, as prescribed by the Code of Civil Procedure.

See *People v. Jackson*, 111 N. Y. 369; 11 Crim. L. Mag. 223; *People v. Johnson*, 110 N. Y. 140; 46 Hun, 672.

The legislature may regulate the manner of procuring a jury. *Stokes v. People*, 53 N. Y. 164; *Gardner v. People*, 6 Park. 155.

Where mere irregularities in drawing a jury are not prejudicial to defendant, they are not grounds of error. *Cox v. People*, 80 N. Y. 500; *Friery v. People*, 2 Keyes, 425; *Ferris v. People*, 35 N. Y. 125; *Dolan v. People*, 64 id. 485 *People v. Petrea*, 30 Hun, 98; 92 N. Y. 128.

Qualifications of jurors. Code Civ. Proc., §§ 1027–1082, inclusive; formation of the jury, Id., §§ 1163–1180, inclusive; Id., §§ 1190, 3350, 3351.

An alien is not entitled to a special jury. Id., § 1190.

Trial jurors in Kings county. Id., §§ 1029, 1126–1162, 1174, 1191.

Trial jurors in the city and county of New York. Id., §§ 1029, 1079–1125, 1174, 1191.

CHAPTER III.

CHALLENGING THE JURY.

SECTION 359. Definition and division of challenges.

360. When there are several defendants, they must unite in their challenges.

361. Challenge to the panel, defined.

362. Upon what founded.

363. When and how taken.

364. If sufficiency of the facts be denied, adverse party may except; exception, how made and tried.

365. If exception overruled, court may allow denial of challenge; if allowed, may permit challenge to be amended.

SECTION 366. Denial of challenge, how made, and trial thereof.

367. Who may be examined on trial of challenge.

368. If challenge allowed, jury to be discharged; if disallowed, jury to be impaneled.

369. Defendant to be informed of his right to challenge an individual juror.

370. Kinds of challenge to individual juror.

371. Challenge, when taken.

372. Peremptory challenge.

373. Number of peremptory challenges to which defendant is entitled.

374. Definition and kinds of challenge for cause.

375. General causes of challenge.

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377. Grounds of challenge for implied bias.

378. Grounds of challenge for actual bias.

379. Exemption, not a ground of challenge.

380. Causes of challenge, how stated.

381. Exceptions to challenge and denial thereof.

382. Challenge, how tried, if denied.

383. Juror challenged may be examined as a witness.

384. Rules of evidence on trial of challenge.

385. Challenges, first by defendant and then by the people.

386. Order of challenges.

387. Jury to be sworn, etc.

§ 359. Definition and division of challenges.—A challenge is an objection made to trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

See *People v. Petrea*, 30 Hun, 98, 103.

§ 360. When there are several defendants, they must unite in their challenges.—When several defendants are tried together they cannot sever their challenges, but must join therein.

See Abbott's Crim. Brief, § 300; Rapalje's Crim. Proc., § 185; *State v. Earle*, 13 Am. Rep. 109; *People v. McCulla*, 8 Cal. 301.

§ 361. Challenge to the panel defined.—A challenge to the panel is an objection made to all the trial jurors returned, and may be taken as well to the panel returned for the term, as to an additional panel ordered to complete the jury.

In *People v. Pakenham*, 115 N. Y. 200, it was held that the objection that jurors had been discharged from the panel and excused from further service during the term is not one that may be taken on a criminal trial by a challenge to the panel. See, also, *People v. Jackson*, 111 N. Y. 369.

A prisoner can waive a challenge to the array after it is allowed. *Pierson v. People*, 79 N. Y. 424.

A challenge which has been overruled is not waived by asking the parties if they have any objections to the jurors that have been drawn, and a reply in the negative. *Hathaway v. Helmer*, 25 Barb. 29.

§ 362. Upon what founded.— A challenge to the panel can be founded only on a material departure, to the prejudice of the defendant, from the forms prescribed by the Code of Civil Procedure, in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.

See *People v. Petrea*, 92 N. Y. 128, 145; *People v. McQuade*, 21 Abb. N. C. 449.

An irregularity in the drawing of the jurors which cannot affect the right of the prisoner is not ground for challenge to the array. *Ferris v. People*, 35 N. Y. 125; 48 Barb. 17; 1 Abb. (N. S.) 193; *Priery v. People*, 2 Keyes, 424; 2 Abb. Dec. 215; 54 Barb. 319.

Not good ground that the panel was certified by the deputy clerk. *People v. Fuller*, 2 Park. 16; or on the ground that a certain class of persons were excluded in the selection of grand jurors. *People v. Jewett*, 3 Wend. 314.

Good ground for challenge, that certain jurors had not been duly summoned. *McCluskey v. People*, 5 Park. 308.

Mode of selecting and relieving jurors when liable to challenge to the array. *Gardiner v. People*, 6 Park. 155.

It is no cause for challenge to the array that two sets of jurors were drawn at the same time from the jury box for two distinct courts, if they be kept entirely separate. *Crane v. Dygert*, 4 Wend. 675.

Nor that the panel was drawn more than fourteen days before the sitting of the court. *Id.*

A challenge to the array, if not made before the jurors are sworn, is waived. *New York v. Mason*, 4 E. D. Smith, 142; 1 Abb. 344.

The district attorney need not verify his answer to the challenge to the array. *Gardiner v. People*, 6 Park. 155.

The withdrawal of a challenge to the array is a waiver of any irregularity in the drawing of the jury. *Pierson v. People*, 18 Hun, 239; 79 N. Y. 424.

§ 363. When and how taken.— A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge.

Challenge must be in writing. *People v. Petrea*, 30 Hun, 98, 103.

A challenge made in the alternative is bad. *Cox v. People*, 19 Hun, 430; 86 N. Y. 500. A challenge to the array, if not made before the jurors are sworn, is waived. *New York v. Mason*, 4 E. D. Smith, 142; 1 Abb. 344. An objection to a juror must be made when he is called upon a panel or it is waived. *Secord v. Burling*, 1 How. 175. See *Lindsley v. People*, 6 Park. 233.

§ 364. **If sufficiency of the facts be denied, adverse party may except; exception, how made and tried.**—If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered upon the minutes of the court; and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

See § 381, *post*; *People v. Petrea*, 30 Hun, 98, 103.

It seems that a verification of a challenge is required. A demurrer to the challenge is not the proper way to raise the objection of want of verification *Cox v. People*, 80 N. Y. 500; 19 Hun, 480.

The district attorney need not verify his answer to the array. *Gardiner v. People*, 6 Park. 155.

§ 365. **If exception overruled, court may allow denial of challenge; if allowed, may permit challenge to be amended.**—If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting, to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may, in like manner, permit an amendment of the challenge.

See *People v. Petrea*, 30 Hun, 98, 103.

§ 366. **Denial of challenge, how made, and trial thereof.** If the challenge be denied, the denial may, in like manner, be oral, and must be entered upon the minutes of the court; and the court must proceed to try the question of fact.

See *People v. Petrea*, 30 Hun, 98, 103.

If the plaintiff challenge the array for the default of the clerk in selecting the jurors, the defendant should join issue on the challenge, and triers be appointed. *Gardner v. Turner*, 9 Johns. 280.

A principal challenge for favor is triable by the court. *Pringle v. Huse*, 1 Cow. 432; *People v. Vermilyea*, 7 id. 108; *Randall's Case*, 5 C. H. Rec. 141.

A challenge for principal cause may be tried by the court, and the decision of the court thereon is final. *Stout v. People*, 4 Park. 71; id. 132.

§ 367. **Who may be examined on trial of challenge.**—Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

§ 368. If challenge allowed, jury to be discharged; if disallowed, jury to be impaneled.— If, either upon an exception to the challenge or a denial of the facts, the challenge be allowed, the court must discharge the jury, so far as the trial of the indictment in question is concerned. If the challenge be disallowed, the court must direct the jury to be impaneled.

§ 369. Defendant to be informed of his right to challenge an individual juror.— Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intend to challenge an individual juror, he must do so when the juror appears, and before he is sworn.

See *People v. Carpenter*, 86 Hun, 315; 16 Abb. N. C. 128; 3 N. Y. Cr. Rep. 98; affirmed, 102 N. Y. 247; 4 N. Y. Cr. Rep. 185; *People v. McLaughlin*, 3 id. 120.

§ 370. Kinds of challenge to individual juror.— A challenge to an individual juror may be taken either by the people or by the defendant, and is either

1. Peremptory, or
2. For cause.

See 1 Bish. Crim. Proc., § 940; *Fouts v. State*, 8 Ohio, 98; *Mallison v. State*, 6 Mo. 399; *Wiley v. State*, 4 Blackf. 458; *Schaeffer v. State*, 8 Wis. 828; *People v. Coniff*, 2 Park. 586.

The law giving the prosecution the right of peremptory challenge is constitutional. *Walter v. People*, 83 N. Y. 147; 6 Park. 15; 18 Abb. Pr. 147.

§ 371. Challenge, when taken.— A challenge must be taken when the juror appears, and before he is sworn; but the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action.

The administering of the oath to each juror as he is found competent is a lawful mode of swearing, and precludes a subsequent peremptory challenge to such juror. *People v. Carpenter*, 4 N. Y. Cr. Rep. 39; 88 Hun, 491.

After each juror has been separately sworn, the subsequent swearing of the jury as a body, at the request of defendant, does not vacate such oath previously administered to such juror, and defendant's absolute right to challenge peremptorily a juror previously sworn is not thereby revived. *People v. Carpenter*, 4 N. Y. Cr. Rep. 39; 88 Hun, 491.

A juror may be peremptorily challenged at any time before he is sworn, whether he has taken his seat in the jury box or not. *People v. Carpenter*, 3 N. Y. Cr. Rep. 92; 86 Hun, 317; 16 Abb. N. C. 130. In that case during the selection of the jury the trial judge stated that all challenges must be exhausted before the jurors took their seats in the box. Defendant's counsel then said

he accepted a certain juror. After the jury had been completed and had taken their seats in the box but had not been sworn, defendant's counsel peremptorily challenged the juror whom he had previously accepted. His number of peremptory challenges had not been exhausted. The judge refused to allow the challenge and said it was too late; *held*, that the defendant had not waived his right to peremptory challenge and that the ruling was erroneous.

Where a juror, after an examination as to his fitness, is peremptorily challenged and does not sit, the question whether there was error in said examination is not brought up on appeal from the judgment. *People v. Petmecky*, 2 N. Y. Cr. Rep. 450.

Error in the examination of a juror subsequently peremptorily challenged by defendant is not ground for reversal, it not appearing that defendant's peremptory challenges were thereby exhausted. *People v. Petmecky*, 2 N. Y. Cr. Rep. 450. See, also, *People v. McGungil*, 41 Cal. 429; 4 Am. & Eng. Encyc. of Law, 829, note 3; 21 Abb. N. C. 458.

Under this section it is within the discretion of the trial judge to grant a request to discharge a juror after he has been accepted and sworn.

The appellate court is not at liberty to review this discretion in the absence of its abuse. *People v. Beckwith*, 8 N. Y. State Rep. 104; 108 N. Y. 369; 5 N. Y. Cr. Rep. 232.

§ 372. Peremptory challenge.—A peremptory challenge is an objection to a juror, for which no reason need be given, but upon which the court must exclude him.

See Thompson Trials, § 41; Rapalje's Crim. Proc., § 185; *People v. Carpenter*, 38 Hun, 490; 4 N. Y. Cr. Rep. 39.

§ 373. — Number of peremptory challenges.—Peremptory challenges must be taken in number as follows:

1. If the crime charged be punishable with death, thirty;
2. If punishable with imprisonment for life, or for a term of ten years or more, twenty;
3. In all other cases, five.

The subject of peremptory challenge has always been under legislative control, and if it were a right given by common law, the legislative will could regulate it. *Walter v. People*, 32 N. Y. 147.

In *Hayes v. State*, 120 U. S. 68, the court say: "Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted. The number of such challenges must necessarily depend upon the discretion of the legislature, and may vary according to the condition of different communities, and the difficulties in them of securing intelligent and impartial jurors. The whole matter is under its control. *Stokes*

v. People, 53 N. Y. 164; *Walter v. People*, 82 id. 147, 159; *Com. v. Dorsey*, 108 Mass. 412, 418. Originally, by the common law, the crown could challenge peremptorily without limitation as to number. By act of parliament passed in the time of Edward I, the right to challenge was restricted to challenges for cause. But, by a rule of court, the crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them. In this country the power of the legislature of a State to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury. In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure their competent and impartial jurors. And to that end it may be a wise proceeding on the part of the legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities. The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained."

§ 374. Definition and kinds of challenge for cause.—

A challenge for cause is an objection to a particular juror, and is either,

1. General, that the juror is disqualified from serving in any case; or
2. Particular, that he is disqualified from serving in the case on trial.

§ 375. General causes of challenge.—General causes of challenge are :

1. A conviction for a felony,
2. A want of any of the qualifications prescribed by the Code of Civil Procedure, to render a person a competent juror.

As to general provisions regarding the necessary qualifications of jurors, see Code Civil Proc., §§ 1027, 1028.

Disqualification of public officers. Id., § 1029.

Qualifications in Kings county. Id., §§ 1029, 1126.

Qualifications in the city and county of New York. Id., §§ 1029, 1079.

§ 376. Particular causes of challenge.—Particular causes of challenge are of two kinds :

1. For such a bias, as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror, and which is known in this Code as implied bias ;

2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias. But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict.

See note on "Competency of Jurors in Criminal Cases," 6 N. Y. Cr. Rep. 89.

Note on "Challenging Jurors," 21 Abb. N. C. 453; Abbott's Crim. Brief, 123.

An existing opinion by a person called as a juror of the guilt or innocence of the accused is *prima facie* a disqualification, and the declaration required of the juror to avoid the objection must be certain and unequivocal. *People v. McQuade*, 110 N. Y. 284; 21 Abb. N. C. 417.

A person called as a juror on a challenge for bias, testified in substance, that he had an opinion in the case which amounted to a conviction, founded upon a careful perusal of the testimony given on a former trial, and declared his belief that he could render an impartial verdict, was not absolute, but was qualified by a doubt. *Held*, that as matter of law the overruling of the challenge was error, and that the error was not cured by the fact that defendant had not exhausted his peremptory challenges, and might have excluded the juror. *People v. McQuade*, 110 N. Y. 285, 301, 302; 21 Abb. N. C. 284.

On the trial of an indictment for murder, a juror challenged for actual bias testified that he had read the newspaper and had formed an opinion which it would take evidence to remove, but that if accepted he would act entirely on the evidence and would not be in any degree influenced by what he had read; he was held competent. *Held*, no error. *People v. Welch*, 1 N. Y. Cr. Rep. 486; 17 Week. Dig. 28; *People v. Cornetti*, 92 N. Y. 85; *People v. Casey*, 96 id. 115; *People v. Crowley*, 102 N. Y. 287; 4 N. Y. Cr. Rep. 261; *People v. Otto*, 88 Hun, 97; 101 N. Y. 690; *People v. Wilson*, 109 id. 345; *Guettig v. State*, 66 Ind. 94; 82 Am. Rep. 99; *People v. Wab. Lee Mon*, 37 State Rep'r, 284.

On examination by the district attorney, a juror testified that he knew of no reason why he could not render an impartial verdict upon the evidence. In answer to the prisoner's counsel he stated that he had read in the newspapers

about the occurrence, but had formed no opinion as to the guilt or innocence of the prisoner; that his mind was free from any impression in regard thereto, but that he was of the opinion from what he had read that the catastrophe was the result of culpable negligence on the part of some one, and that it would require evidence to remove the impression. *Held*, a competent juror. *People v. Buddensieck*, 103 N. Y. 486; 9 Crim. Law Mag. 93; affirming 4 N. Y. Cr. Rep. 230.

Merely reading newspapers does not disqualify unless a determination is arrived at deliberately. *Abbot v. People*, 86 N. Y. 460.

A fixed and definite opinion in the case on the merits disqualifies. *Balbo v. People*, 80 N. Y. 394.

The existence of a prejudice or bias in the mind, or opinion of a juror against any supposed or proposed defense, is not a legal basis for a challenge to the favor. *People v. Carpenter*, 4 N. Y. Cr. Rep. 39; 38 Hun, 490; 102 N. Y. 234; 1 N. Y. State Rep. 652.

The qualifications of the juror relate to the condition of his mind at the time of his selection, not to a mental condition which may be produced by a subsequent or hypothetical event, e. g., the possible defense of insanity. *People v. Reavey*, 4 N. Y. Cr. Rep. 39; 38 Hun, 490.

This section does not require that a juror to be acceptable should say that he knows that he would not be influenced by his previous or present opinion or impression, but only that he believes he would not be, and that he believes he can render an impartial verdict. *People v. Willett*, 3 N. Y. Cr. Rep. 324; 36 Hun, 500.

A juror is competent who testifies that he has an impression as to the guilt or innocence of the prisoner, but that his impressions will not influence his verdict; that he can render an impartial verdict according to the evidence; and that he will give the prisoner the benefit of every reasonable doubt, and acquit him if much doubt exists. *People v. Clark*, 4 N. Y. Cr. Rep. 572; 102 N. Y. 735.

In *People v. O'Neil*, 109 N. Y. 251, 263, the district attorney, as each juror was called, informed him that two members of the board of aldermen of 1884 would be examined as witnesses, and it was supposed that they would testify they were engaged with defendant in the transaction out of which the indictment arose; the juror was then asked, and was permitted to answer under objection and exception, if he had such a prejudice against such persons so testifying as would prevent him from giving to such testimony such weight as it might be entitled to in law. *Held*, no error.

§ 377. Grounds of challenge for implied bias. — A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney, or counsel for the people, or

defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages ;

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution ;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment ;

5. Having served on a trial jury which has tried another person for the crime charged in the indictment ;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it ;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime ;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty ; in which case he shall neither be permitted nor compelled to serve as a juror.

See *People v. Carpenter*, 4 N. Y. Cr. Rep. 46; 88 Hun, 493.

Subdiv. 1. That a juror's father had married the defendant's brother's widow is no ground of principal challenge. *Cash v. Ingham*, 7 Cow. 476; *Eggleston v. Smithby*, 17 Johns. 133.

Subdiv. 2. The fact that a person called as a juror is well acquainted with one of the counsel for defendant, and had advised with him on some occasion not connected with the case on trial, is not a cause of challenge for bias. *People v. McQuade*, 110 N. Y. 284; 11 Crim. L. Mag. 90; 21 Abb. N. C. 417.

Subdiv. 6. *Barclay v. People*, 8 Alb. L. J. 104.

Subdiv. 8. *People v. Carolin*, 115 N. Y. 658; 7 N. Y. Cr. Rep. 123; 94 State Rep. 597; *People v. Damon*, 18 Wend. 851; *People v. Ryan*, 2 Wheeler Crim. Cas. 47; *Walter v. People*, 32 N. Y. 147; 6 Park. 15; *People v. Jones*, 1 Edm. Sel. Cas. 112; *People v. Thomas*, 8 Alb. L. J. 210; *Gordon v. People*, 33 N. Y. 511, 512; *O'Brien v. People*, 66 id. 276; 8 Abb. Pr. (N. S.) 271; 48 Barb. 274; *Lowenberg v. People*, 5 Park. 425; *People v. Wilson*, 3 id. 199. See, also, 1 Thomp. Trials, § 74 *et seq.*

Upon a challenge of the district attorney to a juror, the latter said, on his examination, that he would not convict on circumstantial evidence. *Held*, that the challenge was properly sustained. *People v. Ah Chung*, 54 Cal. 408.

§ 378. **Grounds of challenge for actual bias.**—A challenge for actual bias may be taken for the cause mentioned in the

second subdivision of section three hundred and seventy-six, and for no other cause.

See 21 Abb. N. C. 447; 1 Thomp. Trials, § 59.

§ 379. Exemption not a ground of challenge.—An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

General grounds of exemption. Code Civil Proc., §§ 1080, 1081.

Grounds of exemption in Kings county. Id., §§ 1127, 1128. In the city and county of New York. Id., §§ 1081, 1082.

One who is exempted from jury duty may waive his privilege and legally act as a juror. *United States v. Lee*, 4 Mackey, 498; 54 Am. Rep. 293; *Green v. State*, 59 Md. 123; 43 Am. Rep. 542; 27 Alb. L. J. 393.

§ 380. Causes of challenge, how stated.—In a challenge for implied bias, one or more of the causes stated in section three hundred and seventy-seven must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section three hundred and seventy-six must be alleged. In either case the challenge may be oral, but must be entered upon the minutes of the court.

See *People v. Otto*, 101 N. Y. 690; 4 N. Y. Cr. Rep. 155; *Freeman v. People*, 4 Denio, 9.

§ 381. Exceptions to challenge and denial thereof.—The adverse party may except to the challenge, in the same manner as to a challenge to the panel; and the same proceedings must be had thereon, as prescribed in section three hundred and sixty-four, except that, if the challenge be allowed, the jury must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

§ 382. Challenge, how tried, if denied.—If the facts be denied, the challenge must be tried by the court which must either allow or disallow the same and direct an entry accordingly on the minutes. If the challenge be allowed, the juror must be discharged.

See *Greenfield v. People*, 74 N. Y. 277; *State v. Pike*, 49 N. H. 399; 6 Am. Rep. 542.

§ 383. Juror challenged may be examined as a witness. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness, to prove or disprove

the challenge; and is bound to answer every question pertinent to every inquiry therein.

See *People v. Welch*, 1 N. Y. Cr. Rep. 488.

§ 384. **Rules of evidence on trial of challenges.**— Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues, govern the admission or exclusion of testimony, on the trial of the challenge.

See *People v. Welch*, 1 N. Y. Cr. Rep. 488.

§ 385. **Challenges, first by people and then by the defendant.**— Challenges to an individual juror must be taken first by the people and then by the defendant.

See *People v. McQuade*, 110 N. Y. 284; 21 Abb. N. C. 417.

§ 386. **Order of challenges.**— Challenges of either party must be taken :

1. To the panel;
2. To an individual juror, for a general disqualification;
3. To an individual juror, for implied bias;
4. To an individual juror, for actual bias;
5. Peremptory.

See 21 Abb. N. C. 454; *People v. Welch*, 1 N. Y. Cr. Rep. 488.

§ 387. **Jury to be sworn, etc.**— The first twelve persons who appear, as their names are drawn and called, who are approved as indifferent between the parties, and are not discharged or excused, must be sworn; and constitute the jury to try the issue.

TITLE VII.

OF THE TRIAL.

CHAPTER I. The trial.

- II. Conduct of the jury, after the cause is submitted to them.
- III. The verdict.

CHAPTER I.

THE TRIAL.

- SACSON** 388. In what order trial to proceed.
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402. Court may discharge jury, where it has not jurisdiction of the offense, or the facts do not constitute an offense.
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415. Jurors not to converse together on the subject of the trial, nor form an opinion until the cause is submitted.
416. Proceedings, where juror becomes unable to perform his duty before conclusion of trial.
417. Court to decide questions of law arising during trial.
418. On indictment for libel, jury to determine law and fact.
419. In all other cases, court to decide questions of law, subject to right of defendant to except.

SECTION 420. Charge to jury.

421. Jury may decide in court, or retire in the custody of officers ;
oath of the officers.

422. When defendant on bail appears for trial, he may be committed.

§ 388. In what order trial to proceed. — The jury having been impaneled and sworn, the trial must proceed in the following order :

1. The district attorney, or other counsel for the people, must open the case, and offer the evidence in support of the indictment ;
2. The defendant or his counsel may then open his defense, and offer his evidence in support thereof ;
3. The parties may then, respectively, offer rebutting testimony, but the court, for good reason, in furtherance of justice, may permit them to offer evidence upon their original case ;
4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant or his counsel must commence, and the counsel for the people conclude the argument to the jury ;
5. The court must then charge the jury.

§ 389. Defendant presumed innocent, until contrary proved ; in case of reasonable doubt, entitled to acquittal. A defendant in a criminal action is presumed to be innocent, until the contrary be proved ; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

To convict a defendant the jury are required to find that the facts presented, remove reasonable doubt of his guilt, and to support such conclusion, it must be founded on testimony giving facts legitimately pointing in that direction. *People v. Newton*, 3 N. Y. Cr. Rep. 406.

The guilt must be established beyond a reasonable doubt, not beyond a possible doubt. *People v. Riley*, 3 N. Y. Cr. Rep. 375; *Poole v. People*, 80 N. Y. 646.

An instruction that a reasonable doubt was " a real, substantial and well-founded doubt, and not a mere possibility that the defendant is innocent," and that " the testimony of one witness, if true, is sufficient to warrant a conviction," is correct. *State v. Gann*, 73 Mo. 374.

The term " reasonable doubt " implies that there may be doubts which are not reasonable ; it means a substantial, well-founded doubt. *State v. Rounds*, 76 Me. 123.

A reasonable doubt does not mean all doubt. *U. S. v. Wright*, 16 Fed. Rep. 112.

In *People v. Guidici*, 100 N. Y. 509; 3 N. Y. Cr. Rep. 551, the trial judge, in charging the jury, defined a reasonable doubt as follows: "It is not a mere guess or surmise that a man may not be guilty; it is such a doubt as a reasonable man may entertain after a fair review and consideration of the evidence. A doubt for which some good reason arising from the evidence can be given. When you find such a doubt as that in a case, it is your duty to give the prisoner the fullest and amplest benefit of it." *Held*, no error. See, also, *Rapalje's Crim. Proc.*, § 366; *Lowenstein's Trial*, pp. 195-203; *Billings's Trial* (Moak's argument), 16-18; *State v. Porter*, 64 Iowa, 237; *Cox v. People*, 109 Ill. 457; *People v. Willett*, 36 Hun, 500; *People v. Cruger*, 4 N. Y. Cr. Rep. 60; 38 Hun, 500; *People v. Stott*, 4 N. Y. Cr. Rep. 306; *Brown v. State* (Ind.), 5 N. E. Rep. 900; *Watt v. People*, 126 Ill. 9; 1 L. R. A. 403. Judge Seymour D. Thompson's article (11 *Crim. L. Mag.* 1) on "The Doctrine of Reasonable Doubt." Thompson's *Trials*, §§ 2164-2195, 2498; 16 *Irish Law Times*, 351.

It is a doubt arising from a candid and impartial investigation of all the evidence, and such a doubt as in the graver transactions of life would cause a reasonable and prudent man to hesitate. *Dunn v. People*, 109 Ill. 635.

In charging the jury on the trial of *Fanny Hyde* (Pamphlet Trial, p. 157) the court said: "It is the duty of the court to say to you, in that respect, that a reasonable doubt is not a whim, a conjecture, or a supposition, but a reasonable and substantial doubt, such as might be entertained by intelligent men, and it rests either on the absence of some necessary link in the chain of evidence, or on some substantial fact which the evidence has established."

In *State v. Meyer*, 58 Vt. 457, the respondent requested the court to charge the jury that "if they believe that the evidence, upon any essential point in the case, admits of the slightest doubt consistent with reason, the prisoner is entitled to the benefit of that doubt and should be acquitted." The court instructed the jury that if they believed "that the evidence upon any essential point in the case admits of any reasonable doubt, a doubt consistent with reason, the prisoner is entitled to the benefit of it." *Held*, no error.

Instructions that from the evidence the jury were to "deduce the guilt or innocence of defendant," *held*, erroneous because repugnant to the doctrine of the presumption of innocence and reasonable doubt. *Hackett v. State*, 13 Tex. App. 406. An instruction defining a reasonable doubt as one for which the jury can give a reason based upon the testimony is erroneous. *Cowan v. State*, 22 Neb. 519. Unless a juror is so convinced of the guilt of the accused that moral certainty is reached, there may be said to remain a reasonable doubt in the mind. *Territory v. Owens*, 3 Mont. 187; *Territory v. McAndrews*, id. 158.

An instruction which limits a reasonable doubt to something which is suggested by or arises from the evidence adduced, gives too narrow a definition of that which is implied by a reasonable doubt. *Wright v. State*, 69 Ind. 163. See, also, *Wade v. State*, 71 id. 535.

In *Miles v. U. S.*, 103 U. S. 304; 23 Alb. L. J. 327, the trial judge charged the jury as follows: "The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence

excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests." On writ of error to review, the court say: "The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term 'reasonable doubt,' do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favorable to the accused and is sustained by respectable authority. *Com. v. Webster*, 5 Cush. 320; *Arnold v. State*, 23 Ind. 170; *State v. Nash*, 7 Iowa, 347; *State v. Ostrander*, 18 id. 435; *Donnelly v. State*, 2 Dutcher, 601; *Winter v. State*, 20 Ala. 39; *Giles v. State*, 6 Ga. 276. 'We think there was no error in the charge of which the plaintiff in error can justly complain.'"

It is error to charge that reasonable doubt, if guilt means doubt, suggested by or arising out of the proof made, and that in considering the evidence and arriving at a verdict, "what is called common sense is perhaps the juror's best guide." *Densmore v. State*, 67 Ind. 306; 33 Am. Rep. 96.

When requested in a criminal case to charge as to the doctrine of reasonable doubt, the judge is bound to do so, though the form of the charge requested was not strictly legal. *Madden v. State*, 67 Ga. 151.

A refusal of a request to charge in a criminal case that "defendant is presumed to be innocent until the contrary is proved" is error. *People v. Van Houter*, 23 Week. Dig. 265.

In *Butler v. State*, 7 Baxt. 35, it was held, that an omission to explain to the jury what is a reasonable doubt was not error.

The trial court is not required, in charging the jury, to sub-divide the point of reasonable doubt by limiting it to any particular branch of the case. *People v. Reavey*, 4 N. Y. Cr. Rep. 2; *People v. Cruger*, id. 60; 38 Hun, 500; *Walker v. People*, 88 N. Y. 86; *Weaver v. People*, 132 Ill. 536.

On the trial of an indictment for murder it is error for the court to charge that the defendant must satisfy the jury that some one of his defenses was true. If the jury has a reasonable doubt as to the truth of any one of them the defendant is entitled to an acquittal. *People v. Downs*, 29 State Rep. 117; 56 Hun, 6; affirmed, 123 N. Y. 558.

In *People v. Schryver*, 42 N. Y. 1; 1 Am. Rep. 480, it was held that on a trial for homicide the prisoner is not bound to prove justification beyond a reasonable doubt, but only by a preponderance of evidence. See, also, *People v. McCarthy*, 110 N. Y. 316; *Sawyer v. People*, 91 id. 667; 1 N. Y. Cr. Rep. 249; *People v. Willett*, 3 id. 334; 36 Hun, 500.

The rule that in criminal cases the defendant is entitled to the benefit of a reasonable doubt applies not only to the case as made by the prosecution but to any defense interposed. *People v. Riordan*, 117 N. Y. 73, and cases cited.

In *People v. Stone*, 117 N. Y. 480, a trial for murder where the defense was an *alibi*, after the court had charged that if there was in the case a reasonable doubt it was the duty of the jury to acquit, charged that "an *alibi*, when established to the satisfaction of the jury," was a conclusive defense, adding: "It need not be established beyond a reasonable doubt, but it should be estab-

lished to the satisfaction of the jury." Defendant's counsel excepted to so much thereof as stated, "it should be established to the satisfaction of the jury," and requested the court to charge that "if, taking the whole case together, the evidence for the prosecution and the evidence respecting the *alibi*, they have any doubt of the guilt of the prisoner, they must acquit." The court replied: "I have so charged already." Held, that this was equivalent to saying that his intention on the whole was to so instruct the jury, and if the jury could have understood the charge this adoption by the court of the correct rule must have removed any erroneous impression, and so the exception was not tenable. *Peckham and Gray, JJ.*, dissent.

An action to recover a penalty is no less a civil action because the people are the party plaintiff; and it is not error for the court to decline on request to charge the jury that they must be satisfied beyond a reasonable doubt of the violation by defendants before they could find against them. *People v. Briggs*, 114 N. Y. 64. See *Freund v. Paten*, 10 Daly, 382; 10 Abb. N. C. 311; *Davis v. Rome, etc., R. Co.*, 56 Hun, 372; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; 59 Am. Rep. 194; *Welch v. Jugenheimer*, 56 Iowa, 11; 41 Am. Rep. 77; *Hills v. Goodgear*, 4 Lea, 233; 40 Am. Rep. 5; *Mead v. Husted*, 52 Conn. 53; 52 Am. Rep. 554; *Bell v. McGinness*, 40 Ohio St. 204; 48 Am. Rep. 678; *People v. Evening News*, 51 Mich. 12. See, also, 18 Eng. Rep. 129; 48 Am. Rep. 675; 7 Abb. N. C. 357; 15 Alb. L. J. 444; 84 State Rep'r, 21.

Evidence of character is competent to be submitted to a jury for the purpose of raising a doubt, but it is not essential that a case must be doubtful before such evidence can be considered. *People v. Pollock*, 51 Hun, 613; 22 State Rep. 64; *People v. Pavlik*, 7 N. Y. Cr. Rep. 30; *Com. v. Leonard*, 140 Mass. 473; 54 Am. Rep. 485; *State v. Barth*, 25 S. C. 175; 60 Am. Rep. 496; *State v. Daley*, 53 Vt. 442; 38 Am. Rep. 694; *State v. Sauer*, 38 Minn. 438.

See 9 Cr. L. Mag. 443; *State v. Spooner*, 12 Cr. L. Mag. 219; *Com. v. Cleary* (Pa.), 8 L. R. A. 301.

§ 390. When reasonable doubt of which degree he is guilty, he must be convicted of the lowest. — When it appears, that a defendant has committed a crime, and there is reasonable ground of doubt, in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

See Penal Code, §§ 10, 35; *People v. Lamb*, 2 Abb. Pr. (N. S.) 148; affirming 54 Barb. 342.

In *People v. Downs*, 56 Hun, 6, affirmed, 123 N. Y. 538, it was held that a jury has no right to convict a man of a less degree of a crime, simply because it doubts whether he committed a greater degree, but the elements which constitute such degree must be themselves proved.

It is error to refuse to charge that the prisoner is entitled to the benefit of the doubt in every proposition which the jury pass upon as a matter of fact, which distinguishes the crime from intentional premeditated killing, and makes it a lesser degree of crime. *People v. Willett*, 8 N. Y. Cr. Rep. 324; 36 Hun, 500.

If upon the whole evidence there is a reasonable doubt of the guilt of the accused he is entitled to the benefit of that doubt as well with respect to the degree of crime as to every essential requisite of that degree, and in these respects the burden never shifts from the prosecution. *People v. Willett*, 3 N. Y. Cr. Rep. 324; 36 Hun, 500.

§ 391. Separate trial of defendants jointly indicted. —

When two or more defendants are jointly indicted for a felony, any defendant requiring it, must be tried separately. In other cases, defendants, jointly indicted, may be tried separately or jointly, in the discretion of the court.

Where two or more persons are jointly indicted for a felony, either is absolutely entitled to a separate trial if he demands it. *Babcock v. People*, 15 Hun, 347.

Where four are jointly indicted, three of them cannot insist upon the fourth being tried with them. *Armsby v. People*, 2 Th. & C. 157; *Kelly v. People*, 55 N. Y. 565; 14 Am. Rep. 343.

Persons jointly indicted for an offense arising out of the same transaction may be convicted of different degrees of the same crime. *Klein v. People*, 31 N. Y. 229; *White v. People*, 32 id. 465.

When separate trials are in the discretion of the court the order may be made on the motion of either the district attorney or the defendant. *People v. Stockham*, 1 Park. 438.

On joint indictment for the crime of feloniously and by false pretenses obtaining signatures to a written instrument with intent to defraud, the court may, in its discretion, order separate trials. *People v. Clark*, 102 N. Y. 735; 4 N. Y. Cr. Rep. 575.

The district attorney will determine the order of separate trials. *Patterson v. People*, 46 Barb. 625.

Where, after a jury has been impaneled and a witness sworn, one of the defendants is ordered to be tried separately, the jury and witness must be re-sworn. *Babcock v. People*, 15 Hun, 347.

By statute (Laws 1876, chap. 182, § 1; 1 Birdseye's Stat., 1032, par. 120) all persons jointly indicted shall, upon the trial of either, be competent witnesses for each other the same as if not included in the same indictment. See *People v. Dowling*, 84 N. Y. 484; *Taylor v. People*, 12 Hun, 214; *Wizson v. People*, 5 Park. 119.

§ 392. Rules of evidence in civil cases applicable in criminal cases, except where otherwise provided in this Code. — The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code. Whenever in any criminal proceedings a child actually or apparently under the age of twelve years offered as a witness does not in the opinion of the court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath if, in the opinion of the court or magistrate such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence. [*Amended 1892, ch. 279; in effect Sept. 1, 1892.*]

See *People v. Kelly*, 35 Hun, 304; 3 N. Y. Cr. Rep. 46; *People v. Burns*, 2 id. 427; 33 Hun, 800; *People v. Brower*, 53 id. 219; 24 State Rep. 939; *People v. Murphy*, 101 N. Y. 126; 3 How. Pr. (N. S.) 469; *People v. Thayer*, 1 Park. 596; *People v. Beach*, 87 N. Y. 512-513.

§ 393. Defendant as witness. — The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.

See *Abbott's Crim. Brief*, 387; 27 Am. Rep. 140; *Rapalje's Crim. Proc.*, § 305; 4 Crim. L. Mag. 323.

This section is not violative of the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. *People v. Courtney*, 1 N. Y. Cr. Rep. 557, 573; 94 N. Y. 490.

Defendant by offering himself as a witness waives his privilege. *Connors v. People*, 50 N. Y. 240.

A person indicted, testifying in his own behalf, is subject to cross-examination like other witnesses. *Connors v. People*, 50 N. Y. 440; *People v. Courtney*, 94 id. 490; 1 N. Y. Cr. Rep. 557, 573; 81 Hun, 202; *People v. Casey*, 72 N. Y. 394; *People v. Brandon*, 42 id. 265; *Stover v. People*, 56 id. 320; *People v. Guidici*, 100 id. 507. See, also, *State v. Ober*, 52 N. H. 459; 18 Am. Rep. 88; *State v. Wentworth*, 85 Me. 234; 20 Am. Rep. 638; *Thomas v. State*, 103 Ind. 438; *Com. v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346; *Keyes v. State*, 12 Cr. L. Mag. 600.

The range and extent of a cross-examination is as a general rule within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character. *People v. Oyer and Terminer*, 83 N. Y. 438; *Brown's Case*, 72 id. 571; *Ryan's Case*, 79 id. 594; *People v. Crapo*, 76 id. 290; *People v. Casey*, 72 id. 394; *People v. Clark*, 102 id. 785; *People v. Noelke*, 94 id. 187.

If this limitation is not disregarded, the court will only interfere where there has been an abuse of discretion. *People v. Oyer, etc.*, 83 N. Y. 480; *Great Western Turnpike Co. v. Loomis*, 82 id. 127; *LeBeau v. People*, 84 id. 230; *People v. Casey*, 72 id. 398.

Mere charges or accusations, or even indictments, may not be inquired into on cross-examination since they are consistent with innocence and may exist without moral delinquency. *People v. Irving*, 95 N. Y. 544; *People v. Crapo*, 76 id. 288; 32 Am. Rep. 302; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *Ryan v. People*, 79 N. Y. 594.

In *People v. Brown*, 72 N. Y. 571, the question asked the party testifying in his own behalf was how many times he had been arrested, and it was held inadmissible.

In *People v. Crapo*, 76 N. Y. 288, the prisoner was on trial for burglary and larceny, and was asked, on cross-examination, if he had not been arrested on a charge of bigamy. Held, that the question was inadmissible.

In *People v. Irving*, 95 N. Y. 541, it was held that defendant might be asked, on cross-examination, whether he had not committed an assault upon another person.

On an indictment for selling lottery tickets the prisoner, on cross-examination, may be asked whether he had been in that business and had been convicted of mailing lottery circulars. *People v. Noelke*, 94 N. Y. 187; 46 Am. Rep. 128.

When a prisoner is examined in his own behalf the credit to which he is entitled is for the jury. *Spiegel v. Hays*, 118 N. Y. 661; *Connors v. People*,

50 id. 240; *People v. Moett*, 23 Hun, 60; *People v. Brandon*, 42 N. Y. 265; *Newman v. People*, 63 Barb. 630.

In *People v. Kiernan*, 3 N. Y. Cr. Rep. 247, the trial judge charged the jury that defendant, who had testified, "has doubtless every interest in this world to falsify, if falsifying would bring any immunity to him, and he is undoubtedly to be judged bearing that in mind, but he is not to be discredited for that reason." *Held*, no error. See, also, *Moett v. People*, 85 N. Y. 873.

In *People v. Crowley*, 102 N. Y. 234; 4 N. Y. Cr. Rep. 168, the court charged the jury, in reference to the defendant's testimony, that while his evidence was to be considered as that of any other witness, they should, in determining his credibility, consider the fact that he stood charged with the commission of a serious criminal offense. *Held*, no error. See, also, *State v. Slingerland* 6 Crim. L. Mag. 690.

"But his neglect or refusal to testify does not create any presumption against him." The declaration is not in accord with experience, but its practical meaning is that the court and jury must, so far as they can, determine his case without prejudice or inference against him, founded upon his omission to testify. *People v. Rose*, 52 Hun, 39.

If the prisoner elect to testify in his own behalf, his failure to explain a fact tending to prove his guilt raises a presumption against him. *Stover v. People*, 56 N. Y. 315.

When a person charged with murder defends upon the ground that the killing was accidental, and neglects to call his wife, who was present at the killing, as a witness, that is a circumstance that the jury may consider in coming to a conclusion. *People v. Hovey*, 92 N. Y. 560; 29 Hun, 389; 1 N. Y. Cr. Rep. 188.

On his third trial for arson defendant failed to call a witness who had testified on the previous trials. *Held*, that whether any inference was to be drawn against the prisoner was for the jury. The court refused to rule that "it was the duty of the government, rather than the defense, to hold him (the absentee) as a witness." *Held*, no error. *Com. v. Haskell*, 140 Mass. 128.

No presumption is raised against the defendant by reason of his failure to introduce evidence which is equally accessible to the prosecution and to the defense. *People v. Sweeney*, 4 N. Y. Cr. Rep. 276; 41 Hun, 332; *State v. Rosier*, 55 Iowa, 517; *Com. v. Webster*, 5 Cush. 295.

A failure to give evidence of good character cannot be considered by the jury as a circumstance against the accused. *Ormsby v. People*, 53 N. Y. 472.

No presumption arises against a defendant from his failure to call his accomplice as a witness. *State v. Cousins*, 58 Iowa, 250.

§ 394. Compensation of witness. — The rules as to the compensation of witnesses attending trials in criminal cases, prescribed by special statutes, are continued as there defined.

See § 731, *post*.

§ 395. Confession of defendant, when evidence, and its effect. — A confession of a defendant, whether in the course of

judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

See, generally, 1 Greenl. Ev. (14th ed.), § 213 *et seq.*; Abbott's Crim. Brief, § 474; 46 Am. Rep. 253; 86 Eng. Rep. 279; 19 Cent. L. J. 68; 1 Whart. Crim. Law, §§ 689, 690; 6 Am. State Rep. 242; dissenting opinion of Follett, J., in the *Mondon Case*, 4 N. Y. Cr. Rep. 120.

This section was intended to apply only to voluntary confessions and not to change the statutory rules relating to the examination of persons charged with crime. *People v. Mondon*, 103 N. Y. 211; 4 N. Y. Cr. Rep. 559; *People v. Chapleau*, 121 N. Y.; 30 State Rep. 992; *People v. McCallam*, 3 N. Y. Cr. Rep. 189; affirmed, 103 N. Y. 588.

The rule established by this section is founded upon the common-law rule on the subject of confessions, but is much more definite and stringent. *People v. Mondon*, 103 N. Y. 211.

A declaration made by one accused of a crime denying any criminal act, and explaining to her own advantage a suspicious circumstance — *e. g.*, the existence of foot tracks — is not to be deemed a confession under this section. *People v. McCallam*, 3 N. Y. Cr. Rep. 189; affirmed, 103 N. Y. 588.

A statement by a police officer to the prisoner, after she knew that she was suspected of the crime, that "they had found enough to convict her, and she might as well own up," is not a threat within the meaning of this section." *People v. McCallam*, 3 N. Y. Cr. Rep. 189.

A confession freely and voluntarily made is evidence of the most satisfactory character. *People v. Bennett*, 87 N. Y. 183. See, also, 1 Greenl. Ev., § 215; 1 Archb. Crim. Pl. 125; 1 Phil. Ev. 538-4; Stark. Ev. 73.

It is not error to refuse to charge that confessions are the weakest and most suspicious of all testimony. *People v. Bennett*, 87 N. Y. 117; 4 Abb. Pr. (N. S.) 89; 93 Am. Dec. 551.

In the absence of proof of such threats or inducements as would render the prisoner's confessions inadmissible, a refusal of the court to charge that if the jury believed from the evidence that the prisoner was induced to make the confessions under any inducements or hope of reward held out to him, they should exclude the evidence, is not error. *Woodford v. People*, 62 N. Y. 117; 20 Am. Rep. 464.

Before a confession is received in evidence defendant is entitled to show that it was obtained from him through fear and by promise of immunity. Permitting him to show the facts afterward, and then striking out the confession, is not sufficient. *People v. Fox*, 121 N. Y. 449.

While the court must decide preliminarily the question as to whether threats or promises induced the confession, yet where this is a question of fact, depending on conflicting evidence, it should be submitted to the jury. *People v. Kurts*, 42 Hun, 336.

Defendant having made an affidavit that he and four others committed a robbery, for which he was on trial, may contradict such confession by showing that none of those four persons were at the place of the crime at the time stated in the affidavit. *People v. Fox*, 3 N. Y. Supp. 359.

A confession of a defendant in a criminal action voluntarily made is competent evidence against him although made when under arrest. *People v. Druse*, 103 N. Y. 655; 5 N. Y. Cr. Rep. 10; *Cox v. People*, 80 N. Y. 500; *People v. Wents*, 37 id. 803; *People v. Montgomery*, 13 Abb. (N. S.) 209; *People v. Murphy*, 63 N. Y. 597; *Hartung v. People*, 4 Park. 319; *O'Brien v. People*, 48 Barb. 274; *People v. Rogers*, 18 N. Y. 9; *People v. Thayer*, 1 Park. 595; *People v. Chapleau*, 121 N. Y. 266; 30 N. Y. State Rep. 989; *Massey v. State*, 10 Tex. App. 645; *Jackson v. State*, 69 Ala. 249; *Hopt v. Utah*, 110 U. S. 574.

Where the district attorney informed the prisoner, after his arrest, that he need not make certain statements which he did make, as they would probably be used against him, *held*, that such statements, being voluntary, might be received in evidence against the accused on the trial. *Willett v. People*, 27 Hun, 469; affirmed, 92 N. Y. 29, but on another point. See, also, *People v. Simpson*, 48 Mich. 474.

In *People v. Kurts*, 42 Hun, 835, the prisoner was traveling under arrest with a detective, employed by the district attorney, who conversed with him upon the crime for which he was arrested. It seems that the detective had suggested a confession. The prisoner asked what he was "to get out of the thing," to which the detective answered, that the only benefit to be gotten out of the thing by the prisoner was the benefit that any state's witness would get. On reaching the district attorney's office the detective said if the prisoner wanted to make a statement he could, but he must use his own judgment. The district attorney replied that any statement must be voluntary. It did not appear that he knew of the detective's statement of the benefit a state's witness would get. The prisoner was not allowed to communicate with counsel before making his confession. *Held*, that under this section the admission against the prisoner was error. In that case the prisoner's counsel asked the court to charge that if the jury found that the alleged statement was made on a stipulation of the district attorney, that the prisoner should not be prosecuted therefor, they must reject it. The judge refused so to charge, but did charge that they might take into consideration any evidence there might be in the case tending to show that such a stipulation was made, in determining whether the statement or confession made in the district attorney's office was or was not true. *Held*, that although it was not necessary to decide the question in this case, the court were of the opinion that the judge erred in refusing so to charge. See, also, as to confessions made to detectives, *Heldt v. State*, 20 Neb. 492; 57 Am. Rep. 835; *U. S. v. Stone*, 2 Crim. L. Mag. 770.

Where a prisoner has made involuntary confessions, evidence may be received of facts ascertained in consequence thereof, without proving his statement as to those facts, unless he requires proof of his confession so far as it relates thereto. *Duffy v. People*, 26 N. Y. 589.

In *People v. O'Neil*, 5 N. Y. Cr. Rep. 302; 48 Hun, 87, a witness testified to facts which implicated both himself and defendant in the crime of agreeing to receive a bribe. These facts had been previously stated by the witness to the

district attorney, and witness had been by him promised immunity. Defendant objected to this evidence on the ground that it was in the nature of a confession given under a promise of immunity. *Held*, that the testimony was evidence in chief and not a confession, and was admissible against defendant.

In *People v. Wolcott*, 51 Mich. 612, the prisoner was visited during the night in his cell by three persons in succession who were none of them officials, but who held out promises of favor in order to obtain a confession. *Held*, that admissions of guilt thus obtained were inadmissible. The court say: "No reliance can be placed upon admissions of guilt so obtained; for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them. *State v. Phelps*, 11 Vt. 116; 34 Am. Dec. 672; *State v. Walker*, 34 Vt. 296; *Hector v. State*, 2 Mo. 166; 22 Am. Dec. 454; *State v. Bostick*, 4 How. 563; *State v. Guild*, 10 N. J. Law, 168; 18 Am. Dec. 404; *Spears v. State*, 2 Ohio St. 588; *Commissioner, etc., v. Taylor*, 5 Cush. 605; *Commissioner, etc., v. Truckerman*, 10 Gray, 190; *Smith v. State*, 10 Ind. 106; *Miller v. People*, 39 Ill. 457; *Cain v. State*, 18 Tex. 387; *Davis v. State*, 2 Tex. App. 588; *Van Buren v. State*, 24 Miss. 512; *Jordan v. State*, 32 id. 382; *People v. Barrie*, 49 Cal. 342; *State v. York*, 37 N. H. 175; *Miller v. State*, 40 Ala. 58; *Porter v. State*, 55 id. 95; *State v. Whitfield*, 70 N. C. 356; *State v. Hagan*, 54 Mo. 192, and *Flagg v. People*, 40 Mich. 406."

Where a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is sworn before the coroner's jury, his testimony, should he afterward be charged with the crime, may be used against him on his trial, although at the time of his examination he was aware that it was suspected a crime had been committed, and that he was the criminal. *People v. Mondon*, 103 N. Y. 211; 4 N. Y. Cr. Rep. 559; *Hendrickson v. People*, 10 N. Y. 9; 1 Park. 386, 400; 8 How. Pr. 404; *People v. Thayer*, 1 Park. 595; *People v. McCraney*, 6 id. 49.

In *State v. Carrick*, 16 Nev. 120, a statement made by a defendant to two of his bondsmen that he was short in his accounts, at the time when he was not charged with the crime or under arrest, when no proceedings were threatened or any promise made to shield him from a criminal prosecution, was held admissible.

But if, at the time of his examination before the coroner, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a party accused, called before a tribunal vested with power to investigate preliminarily the question of his guilt, and he is to be treated in the same manner as if brought before a committing magistrate, and an examination, not taken in conformity with the statute, cannot be used against him on the trial for the offense. Code Crim. Proc., §§ 188, 196, 198; *People v. Mondon*, 103 N. Y. 211; 57 Am. Rep. 709.

In that case an Italian laborer, imperfectly understanding the English language, was arrested without warrant for murder, and compulsorily taken by the sheriff before a coroner then engaged in investigating the murder. He was sworn as a witness, had no counsel nor means to procure any, and was not informed that he could not be compelled to testify nor to give self-implicating

answers. *Held*, that his testimony so given was inadmissible on his trial for the murder. The court say: "In *Hendrickson v. People*, 10 N. Y. 13, the wife of the defendant died suddenly in the morning, and in the evening of the same day a coroner's inquest was held. The defendant was called and sworn as a witness upon the inquest. At that time it did not appear that any crime had been committed, or that the defendant had been charged with any crime, or even suspected, except so far as the nature of some of the questions asked of him might indicate such a suspicion. On his subsequent trial on an indictment for the murder of his wife, the statements made by him at the coroner's inquest were held admissible, on the ground that he was not examined as a party charged with the crime; that it had not appeared even that a crime had been committed, and that he had simply testified as a witness on the inquiry as to the cause of the death. "In *People v. McMahon*, 15 N. Y. 384, the defendant was arrested by a constable, without warrant, on a charge of having murdered his wife. The constable took him before the coroner, who was holding an inquest on the body, by whom he was sworn and examined as a witness. It was held that the evidence thus given was not admissible on the prisoner's trial for the murder, and his conviction was reversed upon that ground. In the judgment all the judges who heard the case concurred. The next case is *Teachout v. People*, 41 N. Y. 7. In that case the defendant appeared at the coroner's inquest, in pursuance of a subpoena to testify, and voluntarily attended. He was not under arrest, but was informed by one Dalley that it was charged that his wife had been poisoned, and that he would be arrested for the crime. Before he was sworn he was informed by the coroner that there were rumors that his wife came to her death by foul means, and that some of those rumors implicated him, and that he was not obliged to testify unless he chose. He said he had no objection to telling all he knew. The learned judge delivering the opinion precludes it by a reference to these facts as showing that the statements made were voluntary in every legal sense, and held that a mere consciousness of being suspected of a crime did not so disqualify him that his testimony, in other respects freely and voluntarily given before the coroner, could not be used against him on his trial on a charge subsequently made of such crime. On that ground he held the evidence properly admitted, at the same time referring with approval to the *McMahon Case*, and distinctly limiting the rule of exclusion to cases within its bounds. The present case is identical in all its essential features with the *McMahon Case*. In both cases the prisoner had been arrested without warrant, as a suspected murderer. While under arrest he was taken by the officer having him in charge before the coroner's inquest and examined on oath as to circumstances tending to connect him with the crime. The present case is even more clear than the *McMahon Case*, for here the homicide had been shown before he was examined; the prisoner was informed that he was charged with the murder, the alleged instrument of death was produced, and the prisoner was interrogated as to his motive for the alleged killing, his whereabouts, and other inculpatory matters. There has been no case overruling the *McMahon Case*, and we are not referred to any decision, either in this country or in England, at variance with it, although there are many which sustain it, and even go further in the direction of excluding examinations under oath, before a magistrate, of persons

afterward put upon trial on criminal charges. *Rez v. Lewis*, 6 C. & P. 161; *Rez v. Davis*, id. 177; *Wheiting's Case*, 8 id. 238; *Hawarth's Case*, 4 id. 254, note. The court at General Term in the present case seem to regard the case of *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 173, as sustaining the course pursued by the prosecution, and consequently overruling the *McMahon Case*, but a brief examination will show that there is no analogy between the two cases. The case of McGloin was not that of the examination of a prisoner on oath before a magistrate, before whom he was taken involuntarily while in custody and interrogated by the magistrate, who, to all appearance, had power to require him to answer; but it was a clear case of a voluntary confession. The prisoner was not taken before any magistrate. While under arrest he said to the inspector of police, who had him in charge, that he would make a statement. The inspector then said he would send for Coroner Herman to take it. The coroner was then sent for, and came to police head-quarters, and took down in writing the confession dictated by the prisoner, the coroner asking no questions, and not acting in any official capacity, but as a mere amanuensis to take down the confession and prove the contents. Whether sworn or unsworn is immaterial, as the confession was in no respect compulsory, but was voluntarily offered by the prisoner. It was not taken before a magistrate upon a judicial investigation against the person accused of the commission of the crime. It lacked this essential element of the *McMahon Case*, and is in no respect in conflict with it."

In *People v. Chapleau*, 121 N. Y.; 30 State Rep. 989, the defendant, accused of murder in the first degree, after having been informed by the coroner as to his right to depose or not, and that it might be used against him, was allowed at his own request to make a statement before the coroner's jury which was then reduced to writing, but the prisoner refused to sign it next morning. *Held*, that such statement was admissible on his trial to prove the homicide.

Where it does not appear affirmatively that defendant had been cautioned by the magistrate before making a statement, as required by the Code, but does not appear that he had been so cautioned, it will not be presumed that a magistrate failed in his duty and omitted to caution defendant. *People v. Stott*, 5 N. Y. Cr. Rep. 61.

In *People v. Deacons*, 109 N. Y. 374, it was held that the finding of the body of the person charged to have been murdered, with unmistakable marks thereon of a murder committed, is sufficient "additional proof" to meet the requirements of this section.

The "additional proof" may be either direct or circumstantial. *People v. Carr*, 3 N. Y. Cr. Rep. 578.

Admissions of defendant that after assigning for value his wages to one C. he had received and spent them himself, are insufficient, without further evidence, to convict him of larceny. The written assignment of the wages does not furnish the proof, in addition to the confession, required by this section. *People v. Kelly*, 3 N. Y. Cr. Rep. 414; 37 Hun, 160.

In *People v. Bunge*, 3 N. Y. Cr. Rep. 85, it appeared that the defendants, being wholesale confectioners, sold to one of the witnesses for the prosecution, a compartment box accompanied by one hundred and fifty pieces of chewing gum, each piece being numbered, and according to the description given by

the defendants to the purchaser at the time of the sale, intended to be sold to children for a penny apiece, each one of which drew a prize, contained in said box, consisting of an egg, small or large, according to the number, the whole seeming to form an Easter device. And it further appeared that one of the defendants admitted, at the time, that they had bought the gum, and manufactured and arranged the box themselves, and that they had made large sales thereof; the contrivance so purchased by the witness being exhibited to the jury. *Held*, sufficient evidence to support a conviction for contriving and assisting in contriving a lottery; that the additional proof that the offense was committed, other than defendant's confession, required by section 395, was to be found in the said purchase and the production of the contrivance before the jury; also, that the indictment was supported, though it appeared that the purchase by the witness for the people was made only for the purpose of proving the offense, and with no intention of using the contrivance as a lottery; and that, in any event, the evidence was sufficient to support the indictment for assisting in contriving a lottery.

When, in addition to the confession of a defendant, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of the crime charged, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a non-compliance with the statute which declares that a defendant's confession "is not sufficient to warrant a conviction without additional proof that the crime charged has been committed." The words quoted seem to imply that the confession is to be treated as evidence of the *corpus delicti*, in other words, as competent proof of the body of the crime, though insufficient, without corroboration, to warrant a conviction. *People v. Jaehne*, 108 N. Y. 182; 7 East. Rep. 298; 4 N. Y. Cr. Rep. 479; 8 N. Y. State Rep. 11.

§ 396. **Evidence on trial for treason.** — Upon a trial for treason the defendant cannot be convicted, except upon the testimony of two witnesses to the same overt act, or of one witness to one overt act, and another witness to a different overt act of the same treason. But if two or more distinct treasons, of different kinds, be alleged in the indictment, two witnesses to prove different treasons are not sufficient to warrant a conviction.

§ 397. **Evidence on trial for treason.** — Upon a trial for treason, evidence cannot be admitted, of an overt act not expressly charged in the indictment; nor can the defendant be convicted, unless one or more overt acts be expressly alleged therein.

• § 398. **Evidence on trial for conspiracy.** — Upon a trial for a conspiracy, in a case where an overt act is necessary to constitute the crime, the defendant cannot be convicted, unless one

or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but any other overt act, not alleged in the indictment, may be given in evidence. See Penal Code, § 171.

§ 399. Conviction cannot be had on testimony of accomplice, unless corroborated. — A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

This section introduces a new rule as to an accomplice's evidence. Prior to this section a jury might convict upon such evidence alone. *People v. Thomson*, 3 N. Y. Cr. Rep. 563; *People v. Costello*, 1 Denio, 83; *People v. Dyle*, 21 N. Y. 578; *Lindsay v. People*, 63 id. 154; *People v. Williams*, 29 Hun, 523; 1 N. Y. Cr. Rep. 336.

The rule as to the corroboration of accomplices is stated by the court in *People v. Plath*, 100 N. Y. 592, as follows: "In cases where corroboration is required, there has been some diversity of opinion in the authorities as to the particular facts which should be corroborated and the extent of the corroboration needed in order to comply with the rule; but it is now conceded to be the general rule, that it should tend to show the material facts necessary to establish the commission of a crime, and the identity of the person committing it. When an offense was formerly proven by accomplices, it was the usual practice of trial courts to advise an acquittal, unless such evidence was in some respects corroborated by other testimony (although at common law a conviction upon the evidence of the accomplice alone was sustainable). In those cases, the extent and degree of corroboration rested in the discretion of the trial court, and necessarily varied according to the circumstances of the case. Although such cases are not strictly analogous to those where corroboration is required by statute, they yet furnish some help in determining the degree of proof required in the latter case. The rule as to the corroboration of an accomplice is stated in *Roscoe Crim. Ev.* 122, as follows: 'That there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it.' *Russell Crimes*, 962, says: 'That it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged.' 1 *Greenl. Ev.*, § 381, lays down the rule as held by some, that it is 'essential that there should be corroborating proof that the prisoner actually participated in the offense, and that when several prisoners are to be tried, confirmation is to be required as to all of them before all can be safely convicted; the confirmation of the witness as to the commission of the crime being regarded as no confirmation at all as it respects the prisoner.'"

In *People v. Elliott*, 106 N. Y. 292; 7 N. Y. Cr. Rep. 126; 8 N. Y. State Rep. 708, the court say: "Each circumstance, taken by itself, is quite inconclusive, but when considered together, they certainly furnish some corroborative evi-

dence. It is not necessary that the corroborative evidence of itself, should be sufficient to show the commission of the crime or to connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. The court, before it should submit the case to the jury, should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, and when there is, then it is for the jury to determine whether the corroboration is sufficient to satisfy them of the defendant's guilt. As we said in *People v. Everhardt*, 104 N. Y. 591, 'the law is complied with if there is some evidence fairly tending to connect the defendant with the commission of the crime, so that the connection will not rest entirely upon the evidence of the accomplice.' See, also, *People v. O'Neil*, 109 N. Y. 287; *People v. Jaehne*, 103 id. 282; *People v. Ricker*, 7 N. Y. Cr. Rep. 22; *People v. Courtney*, 28 Hun, 589; 1 N. Y. Cr. Rep. 64; *People v. Hooghkerk*, 96 N. Y. 149; 67 How. Pr. 256; *People v. Ryland*, 97 N. Y. 126; 28 Hun, 568; *People v. Williams*, 29 id. 520; *People v. McCallam*, 6 N. Y. Cr. Rep. 543; *People v. Sharp*, id. 388; *People v. Thomson*, 8 id. 582; *People v. Ricker*, 22 N. Y. State Rep. 654; *People v. Emerson*, 20 id. 18; *People v. Runge*, 3 N. Y. Cr. Rep. 85; *Fraser v. People*, 43 Barb. 306; *People v. Haynes*, 55 id. 450; 38 How. Pr. 369; *People v. Lawton*, 56 Barb. 126; *Maine v. People*, 9 Hun, 113; *People v. Davis*, 21 Wend. 309; *People v. Sherman*, 103 N. Y. 513; *Berry v. People*, 1 N. Y. Cr. Rep. 57; *People v. Kerr*, 6 id. 406; *State v. Maney*, 54 Conn. 178; 9 Crim. L. Mag. 32; 7 East. Rep. 605; *Com. v. Holmes*, 127 Mass. 424; 34 Am. Rep. 341.

Where an accomplice is allowed to testify he may be sufficiently corroborated by his wife. *State v. Myers*, 82 Mo. 558; 53 Am. Rep. 389.

One who purchases a lottery ticket for the purpose of detecting and punishing the vendor, and not with intent to aid in the commission of the offense, is not an "accomplice" within the meaning of this section. *People v. Noelle*, 94 N. Y. 198; 29 Hun, 461; 1 N. Y. Cr. Rep. 257; *People v. Emerson*, 6 id. 157.

Nor is a woman who submits to an abortion an "accomplice." *People v. Vedder*, 98 N. Y. 630; 8 N. Y. Cr. Rep. 32. See, also, 28 Eng. Rep. 559; 20 id. 372; *People v. Meyers*, 5 N. Y. Cr. Rep. 126; *People v. Powell*, 4 id. 585; *People v. Bliven*, 112 N. Y. 79.

Nor a woman who goes with another to a physician's office, where the latter woman submitted, but not in presence of her companion, to an operation for abortion. *Com. v. Drake*, 124 Mass. 21.

The excise law makes the person selling, alone guilty of a criminal act, therefore the purchaser is not an accomplice under this section. *People v. Smith*, 28 Hun, 626; 1 N. Y. Cr. Rep. 72.

A person who in no way aided or abetted a murder but in whose hands a knife was placed by the murderer after the murder is not an accomplice. *People v. Ogle*, 6 N. Y. Cr. Rep. 165; 104 N. Y. 511.

§ 400. If testimony show higher offense than that charged, court may discharge jury, and hold defendant to answer a new indictment. — If it appear by the testimony,

that the facts proved constitute a crime of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed, or continued on or admitted to bail, to answer any new indictment which may be found against him for the higher offense.

See Penal Code, § 685; *People v. Dartmore*, 48 Hun, 323.

§ 401. **If new indictment not found, defendant to be tried on the original indictment.** — If an indictment for the higher crime be dismissed by the grand jury, or be not found at or before the next term, the court must again proceed to try the defendant on the original indictment.

§ 402. **Court may discharge jury where it has not jurisdiction of the offense, or the facts do not constitute an offense.** — The court may also direct the jury to be discharged, where it appears that it has not jurisdiction of the crime, or that the facts, as charged in the indictment, do not constitute a crime.

§ 403. **Proceedings, if jury discharged for want of jurisdiction of the offense, when committed out of the state.** — If the jury be discharged, because the court has not jurisdiction of the crime charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the court may order the defendant to be discharged, or to be detained for a reasonable time specified in the order, until a communication can be sent by the district attorney to the chief executive officer of the state, territory or district where the crime was committed

§ 404. **Proceedings in such case, when offense committed in the state.** — If the crime were committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the crime be a misdemeanor only, it may admit him to bail, in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, appear in such court to await a warrant from the proper county for his arrest.

§ 405. **Proceedings in such case, when offense committed in the state.**— In the case provided for in the last section, the clerk must forthwith give notice to the district attorney of the proper county, that the defendant has been so committed or held to bail.

§ 406. **Proceedings in such case, when offense committed in the state.**— If the defendant be not arrested, as provided in section four hundred and four, on a warrant from the proper county, he must be discharged from custody, or his bail in the action be exonerated, or money deposited instead of bail refunded, as the case may be; and the sureties in the undertaking mentioned in that section must be discharged.

§ 407. **Proceedings in such case, when offense committed in the state.**— If the defendant be arrested, the same proceedings must be had thereupon, as upon the arrest of a defendant in another county, on a warrant of arrest issued by a magistrate.

See §§ 156, 157, *ante*.

§ 408. **Proceedings, if jury discharged because the facts do not constitute an offense.**— If the jury be discharged, because the facts as charged do not constitute a crime, the court must order the defendant, if in custody, to be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he have deposited money instead of bail, that the money deposited be refunded to him, unless in its opinion a new indictment can be framed, upon which the defendant can be legally convicted; in which case, it may direct that the case be resubmitted to the same or another grand jury.

§ 409. **Proceedings, if jury discharged because the facts do not constitute an offense.**— If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in sections 318 and 319.

§ 410. **When evidence on either side is closed, court may advise acquittal; effect of the advice.**— If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant and they must follow the advice.

The court should in a proper case direct an acquittal. *Howell v. People*, 5 Hun, 621; 69 N. Y. 607; *People v. Bennett*, 49 id. 187; *Duffy v. People*, 26 id. 588; *Babcock v. People*, 15 Hun, 347; *Sullivan v. People*, 27 id. 37; *People v. Livingston*, id. 107; *People v. Dohring*, 59 N. Y. 381.

In *People v. Adams*, 16 Hun, 549, defendant plead not guilty, and after trial, his counsel moved the court to direct the jury to acquit defendant; the motion was denied, and a motion to discharge was granted. *Held* error. The case should have been submitted to the jury.

The court has no power to direct a verdict of guilty. *Howell v. People*, 5 Hun, 620; 69 N. Y. 607; *Case v. People*, 6 Abb. N. C. 151. See 10 Alb. L. J. 33; 1 Greenl. Ev., § 49, note.

It is error for the court to charge the jury to find a verdict of guilty even in a case where the question of guilt or innocence depends wholly upon a question of law. *United States v. Taylor*, 8 Crim. L. Mag. 552, 555.

§ 411. View of premises, when ordered, and how conducted. — When, in the opinion of the court, it is proper that the jury should view the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose.

See Abbott's Trial Brief, 72-4; 26 Cent. L. J. 496; *People v. Johnson*, 110 N. Y. 143; 46 Hun, 673; *People v. Buddensieck*, 108 N. Y. 501; *People v. Oyer and Terminer*, 3 N. Y. Cr. Rep. 215; 36 Hun, 379; *People v. Tyrrell*, 3 N. Y. Cr. Rep. 142; *People v. Palmer*, 43 Hun, 407; 5 N. Y. Cr. Rep. 106, disapproving *Skular v. State*, 105 Ind. 289; 55 Am. Rep. 211.

§ 412. Duty of officer as to jury. — The officers, mentioned in the last section, must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

See *People v. Johnson*, 110 N. Y. 143; 46 Hun, 672; *People v. Palmer*, 43 Hun, 401; 5 N. Y. Cr. Rep. 106.

§ 413. Knowledge of juror, to be declared in court, and juror to be sworn as witness. — If a juror have any personal knowledge, respecting a fact in controversy in a cause, he must declare it in open court, during the trial. If, during the retirement of the jury, a juror declare a fact, which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement

must be sworn as a witness, and examined in the presence of the parties.

§ 414. Jurors may be permitted to separate during the trial; if kept together, oath of the officers. — The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or be kept in charge of proper officers. Such officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof.

See 1 Bish. Crim. Proc., §§ 994, 995; Rapalje's Crim. Pro., § 496; *Stephens v. People*, 19 N. Y. 549, 554; *People v. Reagle*, 60 Barb. 527; *People v. Frost*, 5 Park. 53; *People v. Montgomery*, 18 Abb. Pr. (N. S.) 208; *People v. Douglass*, 4 Cow. 26; *Kelly v. State*, 12 Cr. L. Mag. 281.

Even in a capital case, if the court permits the jury to separate before submission and the defendant does not object until after verdict, the objection is waived. *Henning v. State*, 106 Ind. 386; 55 Am. Rep. 756.

On a murder trial after the case was submitted to the jury, members of the jury were permitted to go to a privy seventy-five yards distant, unattended by an officer. It was not shown that any one did or could communicate with them. *Held*, no error. *State v. State*, 64 Miss. 644; 60 Am. Rep. 70.

During the trial of a capital felony the jury were lodged every night in a hotel. On the third night the hotel was destroyed by fire. The jury escaping became separated for an hour or more, some of them mingling with the crowd about the fire, others going home. On an examination by the court every juror swore that during the separation no one had spoken to him or in his presence on the subject of the trial. The prisoner did not object to the continuing of the trial, but refused to assent, or waive any right or advantage resulting to him from the separation. Conviction being had, *held*, that the prisoner was entitled to a new trial. *Early v. State*, 1 Tex. Ct. App. 248; 28 Am. Rep. 409.

§ 415. Jurors not to converse together on the subject of the trial, nor form an opinion until the cause is submitted. — The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court, that it is their duty not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.

See *People, ex rel., v. Oyer and Terminer*, 3 N. Y. Cr. Rep. 211; 36 Hun, 279. Unless it is shown that the prisoner has been prejudiced thereby, a judge's

omission to admonish the jury on adjournment of court is not ground for a new trial. *People v. Draper*, 23 Hun, 1; 1 N. Y. Cr. Rep. 138.

A claim that the trial court omitted to admonish the jurors as required cannot be considered on appeal where there is no part of the record showing distinctly that this was not done, and no question appears to have been raised or exception taken in regard to the matter. *People v. Rugg*, 3 N. Y. Cr. Rep. 172.

Where the case on appeal does not disclose any failure on the part of the trial judge to admonish the jury at each adjournment, such failure will not be presumed. *People v. Reavey*, 4 N. Y. Cr. Rep. 2; 33 Hun, 418.

§ 416. Proceedings, where juror becomes unable to perform his duty before conclusion of trial. — If, before the conclusion of the trial, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged, and another jury to be then or afterward impaneled.

See Cooley Const. Lim. 327-8; 1 Bish. Crim. Law, § 869.

After the retirement of the jury on a murder trial, one of them was taken very ill; he was put in bed in a communicating room, a physician was summoned who attended him, there, not speaking to the others at all, nor to him on the subject of the trial. It appearing that the prisoner sustained no injury, held, that a verdict of guilty was not vitiated. *Goersen v. Com.*, 106 Penn. St. 477; 51 Am. Rep. 534.

§ 417. Court to decide questions of law arising during trial. — The court must decide all questions of law which arise in the course of the trial.

See Thomp. Trials, §§ 1015-1031; Rapalje's Crim. Proc., § 345; *People v. Rego*, 3 N. Y. Cr. Rep. 277; 36 Hun, 131.

In *People v. O'Neil*, 49 Hun, 422, the court say: "A judgment will not be reversed merely because the judge submitted to the jury a question which he ought to determine himself, where it is clear that he ought to have decided it in the same way the jury have found. *Miller v. Ins. Co.*, 2 E. D. Smith, 268; *Cumpton v. McNair*, 1 Wend. 457; *Pangburn v. Ball*, id. 345-352; *Hall v. Sydam*, 6 Barb. 83, 88; *Thompson v. Roberts*, 24 How. (U. S.) 233-240."

§ 418. On indictment for libel, jury to determine law and fact. — On the trial of an indictment for libel, the jury have the right to determine the law and the fact.

The State Constitution, art. I, § 8, provides as follows: "In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." See *People v. Cronnell*, 3 Johns. Cas. 337; *State v. Syphrett*, 27 So. Car. 20; 13 Am. St. Rep. 616, 625, note.

§ 419. In all other cases, court to decide questions of law, subject to right of defendant to except. — On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except; questions of fact, by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

See 1 Greenl. Ev., § 49; 20 Am. Dec. 133, note; 9 Crim. Law Mag. 627-633; 3 id. 484; Thomp. Trials, § 2140; *People v. Crowsell*, 3 Johns. Cas. 337.

The jury in criminal cases are bound by the instructions of the court as to the law, to the same extent as in civil cases. *Duffy v. People*, 26 N. Y. 599; Bk. VI (Reprint ed.), 187; *People v. Upton*, 38 Hun, 109; *McKenna v. People*, 81 N. Y. 360; *People v. Howell*, 5 Hun, 320; 69 N. Y. 607; *People v. Pine*, 2 Barb. 566; *Allis v. Leonard*, 58 N. Y. 291; *People v. Finnegan*, 1 Park. 147. But see *People v. Thayer*, 1 Park. 596. *Contra, Kane v. Com.*, 89 Penn. St. 522; 33 Am. Rep. 787; 1 Crim. Law Mag. 47, 51, note; *Hudelson v. State*, 94 Ind. 426; 48 Am. Rep. 171.

§ 420. Charge to jury. — In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict; and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact.

A new trial will not be granted because the judge, though requested, declined to charge the jury, there being no question of law in the case. *People v. Gray*, 5 Wend. 289.

Comments by the trial judge on the testimony, so long as the judge leaves all the questions of fact to the jury and instructs them that they are the sole judges of matters of fact, are not the subject of legal exception. *People v. Carpenter*, 4 N. Y. Cr. Rep. 39; affirmed, id. 177; *Winne v. McDonald*, 39 N. Y. 239; *Hart v. Ryan*, 6 N. Y. Supp. 924; *People v. O'Neil*, 112 N. Y. 863-864; *Allis v. Leonard*, 58 id. 291; *People v. McInerney*, 5 N. Y. Cr. Rep. 47.

A statement of the court that the evidence is convincing enough to warrant the direction of a verdict if it was a civil case is not error where the question of defendant's guilt is left to the jury. *United States v. Curtis*, 11 Abb. N. C. 1.

A charge of the court which brings to the attention of the jury evidence relevant to a material fact in the case, and stating that if such evidence be true it tends to prove such fact, etc., and in no way controlling or directing the jury as to the force and effect of such evidence, is not error. *People v. Wiggins*, 1 N. Y. Cr. Rep. 290.

Where the courts properly submits to the jury a proposition covering the whole issue, and instructs them that they must find it beyond a reasonable doubt, he cannot be required to sub-divide it, and charge separately as to each

of the elements necessary to constitute the crime, that it must be established beyond a reasonable doubt. *Walker v. People*, 1 N. Y. Cr. Rep. 23; 8 N. Y. 86.

Where the court, upon the failure of a jury to agree, addresses to them remarks claimed to be improper, a general exception presents no question for review, unless it appears that no portion of such remarks was proper. *Berry v. People*, 1 N. Y. Cr. Rep. 48.

Where the judge charges that the crime charged in the indictment is a misdemeanor instead of a felony, and no exception was taken, *held*, no injury to accused. *People v. Bragie*, 88 N. Y. 585; 63 How. Pr. 148.

Where the court charged that the prisoner is presumed to be a sane man until he convinces you that he is insane, *held*, not error. *O'Connell v. People*, 87 N. Y. 377; 63 How. Pr. 436.

§ 421. Jury may decide in court, or retire in the custody of officers; oath of the officers.—After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

See *People, ex rel. Choate, v. Barrett*, 56 Hun, 351; 24 Abb. N. C. 432.

§ 422. When defendant on bail appears for trial, he may be committed.—When a defendant, who has given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court; and he must be committed and held in custody accordingly.

CHAPTER II.

CONDUCT OF THE JURY AFTER THE CAUSE IS SUBMITTED TO THEM.

SECTION 423. Room and accommodations for the jury after retirement, how provided.

424. Accommodations for the jury, when kept together during the trial, or after retirement.

425, 426. What papers the jury may take with them.

SECTION 427. May return into court for information.

428. When jury to be discharged before agreement.

429. Reason for discharge.

430. When jury discharged or prevented from giving a verdict, cause to be again tried.

431. Court may adjourn during absence of jury, as to other business, but deemed open till verdict rendered or jury discharged.

432. Final adjournment of court discharges jury.

§ 423. Room and accommodations for the jury after retirement, how provided.—A room must be provided by the supervisors of the county (or if the trial be in a city court, by the corporate authorities of the city), for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the supervisors or corporate authorities neglect this duty, the court may order the sheriff to perform it; and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge.

§ 424. Accommodations for the jury, when kept together during the trial, or after retirement.—While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, upon the order of the court, at the expense of the county (or if the trial be in a city court, at the expense of the city), with suitable and sufficient food and lodging.

See 1 Bish. Crim. Proc., § 997; *O'Shields v. State*, 55 Ga. 696; *State v. O'Brien*, 7 R. I. 336; *State v. Caulfield*, 23 La. Ann. 148; *Com. v. Roby*, 12 Pick. 496; *State v. Hamilton*, 19 Ohio St. 116; *People v. Kelly*, 46 Cal. 355; 55 Ga. 696.

§ 425. What papers the jury may take with them.—The court may permit the jury, upon retiring for deliberation, to take with them any paper or article which has been received as evidence in the cause, but only upon the consent of the defendant and the counsel for the people.

See Abbott's Crim. Brief, 500.

The fact that a jury took with them a copy of the statutes bearing upon the crime under consideration will not vitiate the verdict unless the prisoner is shown to have been prejudiced thereby. *People v. Draper*, 38 Hun, 1; 1 N.Y. Cr. Rep. 138; *People v. Seeley*, 3 id. 226.

As to the rule in civil cases, see Bailey's Trial Prac. 241.

§ 426. What papers the jury may take with them. —

The jury may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

In *Mitchell v. Carter*, 14 Hun, 448, after the adjournment for the day, the jury having been charged, occupied the court-room and found there the minutes kept by the justice holding the court; some of the jurors read portions of the minutes, and commented thereon; and others attempted to read them but could not make them out. The minutes did not contain all the testimony, nor were they used by consent of counsel. *Held*, the verdict was properly set aside for irregularity.

§ 427. May return into court, for information. — After the jury have retired for deliberation, if there be a disagreement between them, as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant.

See 6 Crim. L. Mag. 185; 4 Amer. & Eng. Encyc. of Law, 815; *People v. Moore*, 50 Hun, 359; *Cornish v. Graff*, 36 id. 164; *Maurer v. People*, 43 N. Y. 1; *Roberts v. State*, 111 Ind. 342; *Rolls v. State*, 52 Miss. 391.

Where the jury return to court for further instructions, the prisoner's counsel must be notified, though the prisoner himself is present. *People v. Cassiano*, 30 Hun, 388; 1 N. Y. Cr. Rep. 505.

The jury being sworn to render a truthful verdict upon the evidence, the extent of the punishment in no way comes within the range of their province, and the court may decline to instruct them on the subject. *People v. Ryan*, 55 Hun, 217; *Wood v. People*, 1 id. 386. *Contra*, *People v. Cassiano*, 30 id. 388.

§ 428. When jury to be discharged before agreement. —

After the jury have retired to consider of their verdict, they can be discharged before they shall have agreed thereon only in the following cases:

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or

2. When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or

3. When with, the leave of the court, the public prosecutor and the counsel for the defendant consent to such discharge.

As to coercion of jury by the court, see *Oranston v. Railroad Co.*, 108 N. Y. 614; *Huntton v. Russell*, 50 How. Pr. 155; *People, ex rel., v. Neilson*, 22 Hun, 1; *Eruvin v. Hamilton*, 50 How. Pr. 38; *State v. Mead*, 53 id. 57; *Berry v. People*, 1 N. Y. Cr. Rep. 43, 57; *State v. Bybee*, 17 Kans. 462; *State v. Lawrence*, 38 Iowa, 51; *Pierce v. Pierce*, 38 Mich. 412. In the case last cited the jury, after being out for one day, sent word to the judge that they could not agree. The judge sent back word that he did not believe it yet, and added the suggestion that they had better agree that night, as he was going away and should not be back until the second day after, and they might not get discharged until he returned. The verdict was returned within an hour afterward. *Held*, that it must be set aside as obtained by duress. The court said: "Jury trials can never be safe unless the verdict is made as far as possible the unbiased and free conclusion of every juror. Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. It may be discretionary with the trial judge to keep a jury out until he is satisfied an honest and free agreement is not to be expected. But there is no legal propriety in keeping a jury confined unreasonably after they have come to an agreement, and a verdict obtained by the suggestion of such an alternative is a verdict obtained by what it would be hard to distinguish from duress. It may be that the court is not bound to be present continually on the chances of an agreement; but any unusual and prolonged delay is not to be favored without giving an opportunity to find a sealed verdict. This error, however innocently committed, as we are bound to suppose it was, must nevertheless, in our opinion, be held fatal to the verdict."

§ 429. Reason for discharge.—Whenever the jury is discharged without a verdict, the reason for the discharge must be entered on the minutes.

§ 430. When jury discharged or prevented from giving a verdict, cause to be again tried.—In all cases where a jury are discharged, or prevented from giving a verdict, by reason of an accident or other cause, except where the defendant is discharged from the indictment, during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term.

See *People v. Goodwin*, 18 Johns. 187; *People v. Peagle*, 60 Barb. 527; *People v. Denton*, 2 Johns. Cas. 275.

§ 431. Court may adjourn during absence of jury, as to other business, but deemed open till verdict rendered or jury discharged.—While the jury are absent, the court may adjourn from time to time, as to other business; but it is nevertheless deemed open, for every purpose connected with the cause

submitted to the jury, until a verdict is rendered or the jury discharged.

See Code Civ. Proc., § 84; *People v. Clowes*, 4 Abb. N. C. 256; *People v. Jackson*, 111 N. Y. 362; *People v. Sullivan*, 115 id. 185.

§ 432. Final adjournment of court discharges jury.—

A final adjournment of the court discharges the jury, but any term of a court may be continued for the purpose of finishing a trial or receiving a verdict.

CHAPTER III.

THE VERDICT.

- SECTION 433.** When the jury have agreed, to be brought into court and their names called; if all do not appear, jury to be discharged and cause again tried.
- 434.** In felony, defendant must be present; in misdemeanor, verdict may be rendered in his absence.
- 435.** Manner of taking the verdict.
- 436.** Verdict may be general or special.
- 437.** General verdict.
- 438.** Special verdict.
- 439, 440.** Special verdict; how rendered.
- 441.** Special verdict; how brought to argument.
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- 450.** Polling the jury.
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- 453.** Proceedings upon general verdict of conviction, or a special verdict.
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§ 433. When the jury have agreed, to be brought into court and their names called ; if all do not appear, jury to be discharged and cause again tried. — When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that event, the cause may be again tried, at the same or another term.

§ 434. In felony, defendant must be present ; in misdemeanor, verdict may be rendered in his absence. — If the indictment be for felony, the defendant must, before the verdict is received, appear in person. If it be for a misdemeanor, the verdict may be rendered in his absence.

See §§ 297, 427, *ante*; Abbott's Crim. Brief, 506, § 821.

FELONIES. *People v. Perkins*, 1 Wend. 91; *Son v. People*, 12 id. 844; *Safford v. People*, 1 Park. 474; *State v. Epps*, 76 N. C. 55; *Smith v. State*, 51 Wis. 615; 87 Am. Rep. 845; *Beaumont v. State*, 1 Tex. Ct. App. 538; 28 Am. Rep. 424; *Temple v. Com.*, 14 Bush, 769; 29 Am. Rep. 442; *Smith v. People*, 8 Colo. 457; *State v. Johns*, 35 La. Ann. 208; *Folden v. State*, 13 Neb. 328; *Cook v. State*, 60 Ala. 39; 81 Am. Rep. 81; *State v. Jenkins*, 84 N. C. 812; 87 Am. Rep. 648; *Barton v. State*, 67 Ga. 653; 44 Am. Rep. 743.

MISDEMEANORS. *People v. Wilkes*, 5 How. Pr. 105.

§ 435. Manner of taking the verdict. — If the jury appear, they must be asked by the court or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they must, on being required, declare the same.

§ 436. Verdict may be general or special. — The jury may either render a general verdict, or when they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict.

See *People v. Rugg*, 98 N. Y. 551; 3 N. Y. Cr. Rep. 182; *People v. Taylor*, id. 802; *Hawker v. People*, 75 N. Y. 487; *Conkey v. People*, 1 Abb. Dec. 418; 5 Park. 81; *People v. McGeery*, 6 id. 658; *People v. Bruno*, id. 657.

§ 437. General verdict. — A general verdict upon a plea of not guilty is either "guilty" or "not guilty;" which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people," or "for the defendant."

See *Potinsky v. People*, 11 Hun. 390; 73 N. Y. 65; *Hawker v. People*, 75 id. 487; *People v. Rugg*, 98 id. 551; 3 N. Y. Cr. Rep. 183; *People v. Taylor*, id. 302.

A general verdict of guilty is the finding of the truth of all the material accounts of the indictment, including value, where that is material; *People v. Bork*, 1 N. Y. Cr. Rep. 393.

General verdict of guilty is erroneous under an indictment for obstructing the highway, containing averments of continuance, when it appears that the defendant acted for his wife, who was the owner of the land. *People v. Livingston*, 27 Hun, 105; 63 How. Pr. 242.

Where the record on a former trial showed that there were two pleas, one of not guilty and the other a former acquittal made by the defendant to the indictment, yet the only verdict rendered by the jury appearing on the record is "guilty as charged in the indictment," *held*, that as the jury did not find against the defendant upon his plea of former acquittal, and as there is no verdict upon the issue raised by that plea and no judgment thereon, a new trial must be had to correct the error in that respect. *People v. Burch*, 5 N. Y. Cr. 33; 1 N. Y. State Rep. 751.

§ 438. **Special verdict.** — A special verdict is that by which the jury find the facts only, leaving the judgment to the court. It must present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented as that nothing remains to the court but to draw from them conclusions of law.

See *People v. Taylor*, 3 N. Y. Cr. Rep. 302; *People v. Hale*, 1 id. 553.

Where, on a trial of an indictment of different counts, there is a specific verdict of guilty on one count and silence as to all others, it is a bar to the prosecution on the count as to which the verdict is silent. *People v. Dowling*, 64 N. Y. 478.

"We find the prisoner guilty of receiving stolen goods, knowing them to be stolen," not sufficient under an indictment for feloniously receiving stolen property, knowing it to have been stolen. *Miller v. People*, 25 Hun, 473.

§ 439. **Special verdict; how rendered.** — The special verdict must be reduced to writing, by the jury or in their presence, entered upon the minutes of the court, read to the jury, and agreed to by them, before they are discharged.

See *People v. Taylor*, 3 N. Y. Cr. Rep. 302.

§ 440. **Special verdict; how rendered.** — The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury.

See *People v. Hale*, 1 N. Y. Cr. Rep. 535.

§ 441. Special verdict; how brought to argument.—The special verdict may be brought to argument by either party, upon five days' notice to the other, at the same or another term of the court; and upon the hearing thereof, the counsel for the defendant may conclude the argument.

§ 442. Judgment thereon.—The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under that indictment, as provided in sections four hundred and forty-four and four hundred and forty-five, judgment must be given accordingly; but if otherwise, judgment of acquittal must be given;

2. If the plea be a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the former conviction or acquittal.

See *People v. Burch*, 5 N. Y. Cr. Rep. 32; 1 N. Y. State Rep. 751.

§ 443. When special verdict defective, new trial to be ordered.—If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence, as established to their satisfaction, the court must order a new trial.

§ 444. Upon indictment for offense consisting of different degrees, jury may convict of any degree, or of any attempt to commit the offense.—Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime.

See § 890, *ante*; Penal Code, § 35, note; *People v. Taylor*, 3 N. Y. Cr. Rep. 302; *People v. Sullivan*, 4 *id.* 193; *People v. Palmer*, 43 Hun, 404; 5 N. Y. Cr. Rep. 105; *People v. Meegan*, 104 N. Y. 531; *People v. McDonald*, 49 Hun, 68.

The jury should first consider and determine whether the defendant is guilty of the crime charged, and if not so found, to consider lesser degrees. *People v. Willson*, 109 N. Y. 347.

In *People v. Downs*, 56 Hun, 6, it was held that a jury has no right to convict a defendant of a lesser degree of a crime simply because it doubts whether

he committed a greater degree, but the elements which constitute such degree must be themselves proved.

When requested to charge, that if doubt existed in the mind of the jury as to the grade of the offense committed, it was their duty to convict of the lesser, the court said that it had told the jury that the prisoner was entitled to all reasonable doubt. *Held*, sufficient. *Abbott v. People*, 86 N. Y. 460.

On a trial for grand larceny, first degree, may convict of grand larceny, second degree. *People v. McCallam*, 3 N. Y. Cr. Rep. 199; or of petit larceny. *People v. McTameny*, 30 Hun, 505; 1 N. Y. Cr. Rep. 437; 66 How. Pr. 70; 13 Abb. N. C. 55.

On an indictment for arson in the first degree, there may be a conviction for attempting to commit arson in any of the lesser degrees. *People v. Long*, 2 Edm. Sel. Cas. 129; *People v. Didien*, 17 How. Pr. 224.

Under an indictment for burglary defendant may be convicted of an attempt to commit the burglary charged. *People v. Lawton*, 56 Barb. 126; *People v. Jackson*, 3 Hill, 92; or of larceny. *People v. Snyder*, 3 Park. 23.

Indictment need not allege facts or circumstances, which, if proven, would constitute the lesser crime. These are matters of evidence for the benefit of the accused. *People v. McDonnell*, 1 N. Y. Cr. Rep. 366; 92 N. Y. 657, mem.

Indictment in common-law form sufficient, notwithstanding the statute, and permits a conviction for the offense charged in any degree, corresponding to the evidence. *People v. McDonnell*, 92 N. Y. 657; 1 N. Y. Cr. Rep. 368; *People v. Thompson*, 41 N. Y. 1; *Ruloff v. People*, 11 Abb. (N. S.) 245; 45 N. Y. 218; *Nevins v. People*, 61 Barb. 307.

§ 445. In other cases, jury may convict of any offense necessarily included in that charge.—In all other cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment.

See *People v. McTameny*, 13 Abb. N. C. 57; 66 How. Pr. 73; *People v. Palmer*, 43 Hun, 406; *People v. Meegan*, 104 N. Y. 531; *People v. Douling*, 1 N. Y. Cr. Rep. 531; *People v. McDonald*, 49 Hun, 68; *People v. Kennedy*, 57 Hun, 535.

§ 446. On indictment against several, jury may render a verdict as to some, and the cause be again tried as to the others.—On an indictment against one or more, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, or which a judgment must be entered accordingly; and the case, as to the rest, may be tried by another jury.

§ 447. In what cases court may direct a reconsideration of the verdict.—When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct

the jury to reconsider their verdict; and if, after the reconsideration, they return the same verdict, it must be entered. But when there is a verdict of acquittal, the court cannot require the jury to reconsider it.

See *Hegeman v. Cantrell*, 40 N. Y. Super. 385; *Root v. Sherwood*, 6 Johns. 68; *Blackley v. Sheldon*, 7 id. 84.

§ 448. In what cases court may direct a reconsideration of the verdict.—If the jury render a verdict which is neither a general nor a special verdict, as defined in sections four hundred and thirty-seven and four hundred and thirty-eight, the court may, with proper instructions as to the law, direct them to reconsider it; and it cannot be recorded, until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially, and leave the judgment to the court.

§ 449. When judgment may be given upon an informal verdict.—If the jury persist in finding an informal verdict, from which, however, it can be clearly understood, that their intention is to find in favor of the defendant, upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given, unless the jury expressly find against the defendant, upon the issue, or judgment be given against him on a special verdict.

See *People v. Burch*, 5 N. Y. Cr. Rep. 32.

§ 450. Polling the jury.—When a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement of either party; in which case they must be severally asked whether it is their verdict; and if any one answer in the negative, the jury must be sent out for further deliberation.

See *People v. Burch*, 5 N. Y. Cr. Rep. 32; *Leighton v. People*, 10 Abb. N. C. 261; 88 N. Y. 117.

§ 451. Recording the verdict.—When the verdict is given, and is such as the court may receive, the clerk must immediately record it in full upon the minutes, and must read it to the jury and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes, and the jury again sent out; but if no disagreement be expressed, the verdict is complete, and the jury must be discharged from the case.

§ 452. Defendant, when to be discharged or detained after acquittal. — If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given; except that when the acquittal is for a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention, to the end that a new indictment may be preferred, in the same manner and with the like effect as provided in sections four hundred and eight and four hundred and nine.

See *People v. Fuller*, 12 Abb. N. C. 196; *People v. Cruger*, 38 Hun, 500.

§ 453. Proceedings upon general verdict of conviction or a special verdict. — If a general verdict be rendered against the defendant, or a special verdict be given, he must be remanded; if in custody, or if on bail, he may be committed to the proper officer of the county, to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money be deposited instead of bail, it must be refunded to the defendant.

§ 454. When defendant acquitted on the ground of insanity, the fact to be stated with the verdict; commitment of defendant to state lunatic asylum. — When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane.

See *People, ex rel. Mooney, v. Walsh*, 21 Abb. N. C. 800, n.

TITLE VIII.

OF THE PROCEEDINGS AFTER TRIAL AND BEFORE JUDGMENT.

CHAPTER I. Bill of exceptions.

II. New trials.

III. Arrest of judgment.

CHAPTER I.

BILL OF EXCEPTIONS.

SECTION 455. In what cases.

456. By whom settled, and how filed.

457. To be settled at the trial, or the point noted in writing.

458, 459. When and how settled, after the trial.

460. Enlarging the time therefor.

461. Effect of not serving exceptions or amendments, within the time prescribed.

§ 455. In what cases.—On the trial of an indictment, exceptions may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced and not otherwise, in any of the following cases:

1. In disallowing a challenge to the panel of the jury;
2. In admitting or rejecting testimony on the trial of a challenge for actual bias to any juror who participated in the verdict, or in allowing or disallowing such challenge;
3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, on the trial of the issue.

See *People v. McQuade*, 110 N. Y. 284; 21 Abb. N. C. 418, 439, 447; *People v. Welch*, 1 N. Y. Cr. Rep. 488; *People v. Petrea*, id. 203; *People v. Willett*, 3 id. 327; 36 Hun, 504; *People v. Petmecky*, 2 N. Y. Cr. Rep. 453; *People v. Sullivan*, 4 id. 197; *People v. Palmer*, 109 N. Y. 419; 5 N. Y. Cr. Rep. 105; *Walker v. People*, 1 id. 7; *Berry v. People*, id. 43, 57; 19 Alb. L. J. 336; 77 N. Y. 588.

§ 456. By whom settled, and how filed.—A bill containing the exceptions must be settled and signed by the presiding judge, and filed with the clerk.

See *People v. Bradner*, 107 N. Y. 1; 44 Hun, 285; *People v. Buddensieck*, 103 N. Y. 478; *People v. McQuade*, 110 id. 284; *Briggs v. Waldron*, 83 id. 582.

§ 457. To be settled at the trial, or the point noted in writing.—The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such direction be given, the point of the exception must be particularly stated in writing, and delivered to the court, and must immediately be corrected or added to, until it is made conformable to the truth.

§ 458. **When and how settled, after the trial.**—If the bill of exceptions be not settled at the trial it must be prepared and served, within five days thereafter, on the district attorney, who may, within five days, serve on the defendant or his counsel, amendments thereto. The defendant may then, within five days, serve the district attorney with a notice to appear before the presiding judge of the court, at a specified time, whether in or out of court, not less than five nor more than ten days thereafter, to have the bill of exceptions settled.

§ 459. **When and how settled, after the trial.**—At the time appointed, the judge must settle and sign the bill of exceptions.

See *People v. Bradner*, 44 Hun, 235; 107 N. Y. 1.

§ 460. **Enlarging the time therefor.**—The time for preparing the bill of exceptions or the amendments thereto, or for settling the same, may be enlarged by consent of the parties, or by the presiding judge, or by a judge of the supreme court but by no other officer.

§ 461. **Effect of not serving exceptions or amendments, within the time prescribed.**—If the bill of exceptions be not served within the time prescribed in section four hundred and fifty-eight, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served, and the parties omit, within the time limited by section four hundred and fifty-eight, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, and the other to the amendments.

CHAPTER II.

NEW TRIALS.

SECTION 462. New trial.

463. When granted.

464. Effect of granting new trial.

465. In what cases granted.

466. Application, when to be made.

§ 462. **New trial.** — A new trial is a re-examination of the issue, in the same court, before another jury, after a verdict has been given.

See § 544 post. *People v. Beckwith*, 5 N. Y. Cr. Rep. 233; 42 Hun, 367; *People v. Palmer*, 43 id. 409.

§ 463. **When granted.** — A new trial can be granted by the court in which the former trial was had only in the cases provided in section four hundred and sixty-five.

See *People v. Bradner*, 107 N. Y. 1; 44 Hun, 233; *People v. Palmer*, 43 id. 409; 5 N. Y. Cr. Rep. 109; *People v. Draper*, 28 Hun, 8.

§ 464. **Effect of granting a new trial.** — The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument.

See *People v. Palmer*, 109 N. Y. 413; 4 Am. St. Rep. 477; 5 N. Y. Cr. Rep. 109; 43 Hun, 409; *People v. Upton*, 38 id. 110; *People v. Cignarale*, 110 N. Y. 88.

In the course of the trial of an indictment for murder the district attorney referred to a former conviction of the defendant on trial under the same indictment, and in his argument referred to the fact that a witness called for the defendant on the former trial was not called on this. *Held*, that while the language of the district attorney was improper and a technical violation of this section, yet as the facts showed defendant was not injured it was not a ground for reversal; that to justify a reversal on such a ground the court should be satisfied that justice requires it. *People v. Greenwall*, 115 N. Y. 520.

In *Hatch v. State*, 8 Tex. App. 416; 34 Am. Rep. 751, the public prosecutor in addressing the jury denounced defendant as a "fellow," and a "land thief," and "as guilty as hell;" and the prisoner having previously been convicted and got a new trial, the prosecutor said the new trial was obtained "by a dodge and technicality," and boasted of his ability to convict him before twelve honest men as many times as he could get a new trial. The statute forbade any allusion to a former conviction. On account of this language, the defendant being convicted, a new trial was granted, although the trial judge admonished the jury to disregard it.

§ 465. **In what cases granted.** — The court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

1. When the trial has been had in his absence, if the indictment be for a felony;

2. When the jury has received any evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven ;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented ;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors ;

5. When the court has misdirected the jury in a matter of law, or has refused to instruct them as prescribed in section four hundred and twenty ; and the defendant has, at the trial, excepted to such misdirection or refusal ;

6. When the verdict is contrary to law or clearly against evidence ;

7. When it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as if before received would probably have changed the verdict ; if such evidence has been discovered since the trial, is not cumulative ; and the failure to produce it on the trial was not owing to want of diligence.

See *People v. Kelly*, 31 Hun, 225; *People v. Osterhout*, 3 N. Y. Cr. Rep. 446; *People v. Wentworth*, 4 id. 209; *People v. Joyce*, id. 344.

As to the power of the appellate courts to order a new trial, see §§ 527-528.

An appeal from a judgment of conviction brings before the general term for review the decision of the trial court upon a motion for a new trial, as well as the proceedings upon the trial. *People v. Mangano*, 29 Hun, 259, 263.

Subdiv. 2. See *People v. Johnson*, 110 N. Y. 135; affirming 46 Hun, 667; *People v. Palmer*, 43 id. 407, 409; 5 N. Y. Cr. Rep. 106, 109; *People, ex rel. Choate, v. Barrett*, 30 State Rep. 732; *People v. Tyrrell*, 3 N. Y. Cr. Rep. 142.

When, in a capital case after the testimony was closed, a part of the jury, in company with an officer, visited the scene of the homicide, it was held ground for a new trial. *Eastwood v. People*, 3 Park. 25; 14 N. Y. 563.

Subdiv. 3. See *People v. Kelly*, 94 N. Y. 526; 2 N. Y. Cr. Rep. 18; *People v. Seely*, 3 id. 232; *People v. Menken*, 36 Hun, 91; *People v. Riley*, 3 N. Y. Cr. Rep. 384; *Beebe v. People*, 5 Hill, 32; *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207; *Eastwood v. People*, 3 Park. 25; *People v. Hartung*, 4 id. 256; 17 How. Pr. 85; *Wilson v. People*, 4 Park. 619; 8 Abb. Pr. 137; *People v. Draper*, 26 Hun, 1; *Early v. State*, 1 Tex. App. 248; 28 Am. Rep. 409; *Kelly v. State*, 12 Crim. Law Mag. 231.

It is not a ground for a new trial in a capital case that one of the jurors was apparently asleep, to the knowledge of the prisoner's counsel, who omitted to call the court's attention to it. *People v. Morrissey*, 1 Sheld. 295.

If a jury take out with them certain written evidence read in evidence, to which is attached an affidavit not so read, it is ground for a new trial. *Mitchell's Case*, 1 City Hall Rec. 147.

When a new trial is desired on the ground of irregularities of the jurors while in the jury room, affidavits of the jurors cannot be used on the motion. 34 Am. Dec. 617; 21 Am. L. Reg. (N. S.) 742; *Wilson v. People*, 4 Park. 619; *People v. Hartung*, 17 How. Pr. 85; *Ostrander v. People*, 28 Hun, 46; *Wiggins v. Downer*, 67 How. Pr. 65.

A new trial will not be granted in a capital case merely because the jury read a newspaper containing a report of the trial but without any comments which would prejudice the prisoner. *People v. Gaffney*, 14 Abb. Pr. (N. S.) 36; 1 Sheld. 304; affirmed, 50 N. Y. 424.

Subdiv. 4. *Williams v. State*, 15 Lea, 129; 54 Am. Rep. 404; *Cochlin v. People*, 93 Ill. 410.

Subdiv. 5. See *People v. Casey*, 96 N. Y. 116; 2 N. Y. Cr. Rep. 194.

A new trial will not be granted because the trial judge refused to charge the jury, there being no question of law in the case. *People v. Gray*, 5 Wend. 289.

That the judge laid down an erroneous proposition and immediately corrected it, is no ground for a new trial. *Eggle v. People*, 56 N. Y. 642.

Subdiv. 6. See *People v. Stokes*, 2 N. Y. Cr. Rep. 382; *Sawyer v. People*, 27 Hun, 286.

A new trial may be granted where the verdict is clearly against the weight of evidence. *Rogers v. People*, 3 Park. 632; *People v. Shay*, 4 id. 344; *Manuel v. People*, 48 Barb. 548.

Subdiv. 7. See *People v. Stokes*, 2 N. Y. Cr. Rep. 382; *People v. Beckwith*, 42 Hun, 366; *People v. Lane*, 1 N. Y. Cr. Rep. 554; 31 Hun, 13; *Geneva, etc., R. Co. v. Sage*, 35 id. 95; *Anderson v. Market Nat. Bank*, 66 How. Pr. 8.

When a new trial may be had on ground of newly-discovered evidence. *People v. Hovey*, 30 Hun, 354; 1 N. Y. Cr. Rep. 324; 92 N. Y. 534; *People v. Leighton*, 1 N. Y. Cr. Rep. 468; *People v. Bradner*, 107 N. Y. 1.

A motion for a new trial upon the ground of newly-discovered evidence cannot be granted where such evidence is cumulative. *People v. Leighton*, 1 N. Y. Cr. Rep. 468; 30 Hun, 354.

It must be shown affirmatively by the party seeking the new trial that the proposed evidence is not cumulative. *People v. Hovey*, 30 Hun, 354; 1 N. Y. Cr. Rep. 324; affirmed, 93 N. Y. 651; *People v. Jones*, 25 Weekly Dig. 541.

When the defendant in a criminal action testifies in his own behalf, but no evidence of good character is given on his part, on a motion for a new trial on affidavits showing defendant's good character, such evidence is not cumulative, and a new trial may be ordered when it appears such evidence, had it been given, might have changed the verdict. *People v. Lane*, 31 Hun, 13.

Newly-discovered evidence not sufficient unless it appears that it could not have been discovered with proper diligence on the trial. *People v. Mack*, 3 Park. 673.

In cases of doubt where the evidence is conflicting and the credibility of witnesses in question, and no error has been committed, a new trial will be denied. *Id.*

On a motion for a new trial on the ground of newly-discovered evidence, the court must consider not only the affidavits upon which the motion is based, but the testimony and proceedings on the former trial, and also whether the newly-discovered evidence would, if given on the former trial, have changed the verdict. *People v. Hovey*, 30 Hun, 354; 1 N. Y. Cr. Rep. 324; affirmed, 93 N. Y. 651.

Evidence which existed and was known to defendant before the former trial cannot be considered newly-discovered, because he has since discovered that it might have been important if used on the trial. *People v. Hovey*, 30 Hun, 354; 1 N. Y. Cr. Rep. 324; affirmed, 93 N. Y. 651.

A new trial should not be granted upon the application of defendant, where the alleged newly-discovered evidence is inconsistent with the testimony of the defendant on the former trial. *People v. Hovey*, 30 Hun, 354; 1 N. Y. Cr. Rep. 324; affirmed, 93 N. Y. 651.

§ 466. **Application, when to be made.**— The application for a new trial must be made before judgment, except an application made under subdivision seven of section four hundred and sixty-five, which may be made at any time within one year, and except in case of a sentence of death when the application may be made at any time before execution, and in case the court before which the trial was had is not in session so that the application can be made and determined before the execution, then the application may be made to any justice of the supreme court or special term thereof, within the judicial department where the conviction was had.

See *People v. Bradner*, 107 N. Y. 10; *People v. Leighton*, 1 N. Y. Cr. Rep. 463; *People v. O'Neil*, 47 Hun, 156; *People v. Palmer*, 5 N. Y. Cr. Rep. 109; 43 Hun, 409; *People v. Beckwith*, 43 id. 367; 5 N. Y. Cr. Rep. 233; *People v. Wentworth*, 4 id. 210; *People v. Hovey*, 1 id. 324; 30 Hun, 354; 93 N. Y. 651.

CHAPTER III.

ARREST OF JUDGMENT.

EMERSON 467. Motion in arrest of judgment, defined, and upon what defects founded.

468. Court may arrest judgment without motion.

469. Motion, when and how made.

470. Defendant, when to be held or discharged.

§ 467. Motion in arrest of judgment, defined, and upon what defects founded.—A motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section three hundred and thirty-one.

See *People v. D'Argencour*, 82 Hun, 179; *People v. Menken*, 86 id. 99; 3 N. Y. Cr. Rep. 242; *People v. Upton*, 88 Hun, 107; *People v. Joyce*, 4 N. Y. Cr. Rep. 348; *People v. Beckwith*, 5 id. 283; 42 Hun, 367; *People v. Sullivan*, 49 id. 883.

Upon a motion in arrest of judgment only two objections are available; (1) "to the jurisdiction of the court over the subject of the indictment;" (2) "that the facts stated do not constitute a crime." *People v. Buddensieck*, 108 N. Y. 487; 5 N. Y. Cr. Rep. 71.

A motion for arrest of judgment in a criminal action cannot be made save for some defect that appears on the record; it cannot be based upon proof by affidavit of facts outside and constituting no part of the record. *People v. Kelly*, 94 N. Y. 526.

Upon the trial of an indictment the prisoner was not formally arraigned, nor did he formally plead. He was present, with counsel, at the trial, made no objection to the failure to arraign, nor did he request to plead. After verdict, these objections were first raised by a motion in arrest of judgment. *Held*, that they were untenable, no substantial right of the prisoner having been taken away, and that the question was not a proper ground for such a motion. *People v. Osterhout*, 84 Hun, 260; 3 N. Y. Cr. Rep. 445.

Motion in arrest is not confined to indictment but may include the whole record. *People v. Bruno*, 6 Park. 657.

It cannot bring up a variance between the proof and the indictment. *People v. Onondaga Gen. Sess.*, 1 Wend. 296; *Case v. People*, 6 Abb. N. C. 151.

Neither can mistakes of the court on trial, nor of the jury, be considered. *People v. Thompson*, 41 N. Y. 1; *People v. Allen*, 43 id. 28.

A motion in arrest of judgment can only be made for defects on the record. *Jacobowsky v. People*, 6 Hun, 524; 64 N. Y. 659.

Cannot be made for defect of evidence. *Id.*

A conviction in a capital case without a venire being returned and filed is sufficient ground. *People v. McKay*, 8 Johns. 212.

A mere irregularity in the venire no ground. *People v. Herkimer County, etc.*, 20 Johns. 310.

That the time laid in the indictment is beyond the period of limitation is no ground. *People v. Van Santford*, 9 Cow. 655.

Where an indictment for misdemeanor contains two counts, one good and the other bad, judgment will not be arrested. *Kane v. People*, 3 Wend. 363; 8 id. 208; *People v. Davis*, 45 Barb. 494; *Fraser v. People*, 54 id. 806; *People v. Stein*, 1 Park. 202; *People v. Gilkinson*, 4 id. 26.

One good count is sufficient to sustain a conviction. *People v. Davis*, 56 N. Y. 95.

§ 468. **Court may arrest judgment without motion.**—The court may also, on its own view of any of these defects, arrest the judgment without motion.

§ 469. **Motion, when and how made.**—The motion must be made before or at the time when the defendant is called for judgment. If made before, it must be on notice to the district attorney, or in his presence.

See *People v. D'Argencour*, 95 N. Y. 624; 82 Hun, 179.

§ 470. **Defendant, when to be held or discharged.**—When judgment is arrested, and it appears that there is not evidence sufficient to convict the defendant of any crime, he must, if in custody, be discharged; or, if under bail, his bail must be exonerated; or, if money has been deposited instead of bail, it must be refunded; and in such case the arrest of judgment operates as an acquittal of the charge upon which the indictment was found; but if there is reasonable ground to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the court may order him to be recommitted or admitted to bail anew to answer the new indictment; if there is reasonable ground to believe him guilty of another crime, he must be committed or held to answer therefor; and in no case, when recommitted or held to answer, is the former verdict a bar to a new indictment.

CHAPTER IV.*

SUSPENSION OF JUDGMENT.

SECTION 470a. Suspension of judgment.

470b. Regarded as a conviction.

§ 470a. **Suspension of judgment.**—If the judgment be suspended after a plea or verdict of guilty or after a verdict against the defendant upon a plea of a former conviction or acquittal the court may pronounce judgment at any time thereafter within the longest period for which the defendant might have been sentenced; but not after the expiration of such period, unless the defendant shall have been convicted of another crime committed during such period.

§ 470b. **Regarded as a conviction.**—If judgment be not pronounced as in the last section provided, nevertheless;

* Added Laws 1893, ch. 651; in effect May 8, 1893. By section 2 of said act, all acts and parts of acts inconsistent with the provisions of this act are hereby repealed, in so far as inconsistent therewith.

1. For the purpose of indictment and conviction of a second offense, the plea or verdict and suspension of judgment shall be regarded as a conviction, and shall be pleaded according to the fact.

2. The said plea or verdict and suspension of judgment may be proved in like manner as a conviction for the purpose of effecting* the weight of the defendant's testimony in any action or proceeding, civil or criminal.

TITLE IX.

OF THE JUDGMENT AND EXECUTION.

CHAPTER I. The judgment.

II. The execution.

CHAPTER I.

THE JUDGMENT.

SECTION 471, 472. Time for pronouncing judgment, to be appointed by the court.

473. In felony, defendant must be present; in misdemeanor, judgment may be pronounced in his absence.

474. When defendant is in custody, how brought before the court for judgment.

SECTION 475. How brought before the court, when he is on bail.

476. Bench warrant to issue.

477. Form of bench warrant.

478, 479. Service of the bench warrant.

480. Arraignment of defendant for judgment.

481. What cause may be shown against the judgment.

482. If no sufficient cause shown, judgment to be pronounced.

483. Court may summarily inquire into circumstances in aggravation or mitigation of punishment.

484. Judgment to pay fine.

485. The judgment roll.

§ 471. Time for pronouncing judgment to be appointed by the court. — After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment be not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment.

See *People, ex rel. Evans, v. McEwen*, 67 How. Pr. 105; 2 N. Y. Cr. Rep. 313; *Moett v. People*, 85 N. Y. 373; *State v. Vose*, 8 L. R. A. 767.

There is no constitutional principle which requires that judgment on conviction must be pronounced by the same judges before whom the trial was had. *People v. Bork*, 96 N. Y. 198; *Weed v. People*, 56 id. 628.

§ 472. Time for pronouncing judgment to be appointed by the court.—The time appointed must be at least two days after the verdict, if the court intend to remain in session so long, or if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant.

See *People v. Boerhardt*, 104 N. Y. 592.

§ 473. In felony, defendant must be present; in misdemeanor, judgment may be pronounced in his absence.—For the purpose of judgment, if the conviction be for a felony the defendant must be personally present; if it be for a misdemeanor, judgment may be pronounced in his absence.

§ 474. When defendant is in custody, how brought before the court for judgment.—When the defendant is in custody, the court may direct the officer in whose custody he is to bring him before it for judgment; and the officer must do so accordingly.

§ 475. How brought before the court when he is on bail. If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment, when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

§ 476. Bench warrant to issue.—The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench warrant into one or more counties.

§ 477. Form of bench warrant.—The bench warrant must be substantially in the following form :

“County of *Albany*, [or as the case may be.]

“In the name of the people of the State of New
[SEAL.] York—To any sheriff, constable, marshal or policeman in this state. A. B. having been on the

day of , 18 , duly convicted in the *court of sessions of the county of Albany* [or as the case may be], of the crime of [designating it generally].

If, upon the trial of that question, it is found that he is sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment;

2. That he has good cause to offer, either in arrest of judgment, or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

See *People v. Osterhout*, 34 Hun, 262; *People v. Menken*, 8 N. Y. Cr. Rep. 443.

§ 482. **If no sufficient cause shown, judgment to be pronounced.**—If no sufficient cause be alleged, or appear to the court, why judgment should not be pronounced, it must thereupon be rendered.

§ 483. **Court may summarily inquire into circumstances in aggravation or mitigation of punishment.**—After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the suggestion of either party, that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time, and upon such notice to the adverse party as it may direct.

See *People v. Bradner*, 107 N. Y. 12; *People v. Vermilyea*, 7 Cow. 108.

§ 484. **Judgment to pay fine.**—The power to remit a fine imposed by any court, whether of record or not of record, imposed for any criminal offense whatever, shall only be exercised as in this section provided. Any court of record, except an inferior court of local jurisdiction, which has imposed a fine for any criminal offense, or the presiding judge thereof, or any judge authorized to preside therein, shall have power in his discretion, on five days' notice to the district attorney of the county in which such fine was imposed, to remit such fine or any portion thereof. In case of a fine imposed by a court not of record or by any inferior court of local jurisdiction for any criminal offense whatever, the county judge of the county in which the fine was imposed, and in case of a fine imposed by such a court in the city

of New York, the court of general sessions, or any judge thereof, upon five days' notice to the district attorney of the county in which such fine was imposed, shall have the same power. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.

See § 718, *post*. *People, ex rel. Stokes, v. Risley*, 4 N. Y. Cr. Rep. 110; 88 Hun, 281; *Matter of Hoffman*, 1 N. Y. Cr. Rep. 484; *Matter of Bray*, 84 State Rep. 648; *Matter of Bryant*, 24 Fla. 278; 12 Am. St. Rep. 200, 202, *note*.

§ 485. **The judgment-roll.**— When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment-roll:

1. A copy of the minutes of a challenge interposed by the defendant to a grand juror, and the proceedings and decision thereon;

2. The indictment and a copy of the minutes of the plea or demurrer;

3. A copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict, and the proceedings and decision thereon;

4. A copy of the minutes of the trial;

5. A copy of the minutes of the judgment;

6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment;

7. The bill of exceptions, if there be one;

8. When the judgment is of death, the clerk, in addition to the foregoing, must forthwith cause to be prepared and printed the number of copies of the stenographer's minutes and judgment-roll which are required by the rules of the court of appeals, which shall form the case and exceptions upon which the appeal shall be heard, and three copies shall also be furnished to the defendant's attorney and three to the district attorney and one to the governor of the state, and the remainder distributed according to the rules of the court of appeals. The expense of preparing and

printing the minutes and judgment-roll shall be a county charge, payable out of the court fund upon the certificate of the county clerk, approved by the county judge of the county in which the conviction was had, but in the city and county of New York such expense shall be payable on the certificate of the clerk of the court in which the conviction was had, approved by the judge presiding at the trial.

See *People v. Bradner*, 107 N. Y. 11; *People v. McQuade*, 110 id. 284; 21 Abb. N. C. 448; *People v. Carlton*, 115 id. 618; *People v. O'Neil*, 47 Hun, 155; *People v. O'Donnell*, 46 id. 358; *People v. Sharp*, 45 id. 504; *People v. Beckwith*, 42 id. 368; *People v. Osterhout*, 34 id. 262; *People v. Mangano*, 29 id. 263; *Ostrander v. People*, id. 519; *People v. Petrea*, 30 id. 102; *People v. Hovey*, id. 557; *People v. Bock*, 1 N. Y. Cr. Rep. 898; *People v. Patmecky*, 2 id. 458; *People v. Tyrrell*, 3 id. 148; *People v. Havens*, id. 287; *People v. Joyce*, 4 id. 844, 848; *People v. Schad*, 58 Hun, 573; 85 State Rep. 148.

CHAPTER II.

THE EXECUTION.

SECTION 486. Authority for the execution of a judgment, except of death.

487. Commitment of the defendant.

488. Judgment of imprisonment; by whom and how executed.

489. Duty of sheriff.

490. Duty of sheriff.

§ 486. Authority for the execution of a judgment, except of death.—When a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.

See *People v. Bradner*, 107 N. Y. 12.

Sentence void in part may be enforced as to the valid portion if properly separable and ignored as to the illegal and void part. *People, ex rel. Trainor, v. Baker*, 89 N. Y. 460.

§ 487. Commitment of the defendant.—If the judgment be imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with.

See *People v. O'Neil*, 47 Hun, 156.

Sentence must be definite. A sentence in the disjunctive, providing that the defendant pay a specified fine or be imprisoned for a specified period, cannot be imposed. *Matter of Hoffman*, 1 N. Y. Cr. Rep. 484.

A prisoner is not detained by virtue of the *mittimus*, but by virtue of the judgment; hence a defect in the warrant of commitment is immaterial. *People, ex rel. Trainor, v. Baker*, 89 N. Y. 461.

§ 488. Judgment of imprisonment; by whom and how executed.—When the judgment is imprisonment in a county jail, or a fine and that the defendant be imprisoned until it be paid, the judgment must be executed by the sheriff of the county. In all other cases, when the sentence is imprisonment, the sheriff of the county must deliver the defendant to the proper officer, in execution of the judgment.

In case of misdemeanor, sentence begins to run from the day it is pronounced, and any time the prisoner may be detained in the county jail must be credited on his sentence. *People v. Lincoln*, 25 Hun, 306; 62 How. Pr. 412. See *People v. McEwen*, id. 226.

§ 489. Duty of sheriff.—If the judgment be imprisonment, except in a county jail, the sheriff must deliver a copy of the entry of the judgment upon the minutes of the court, together with the body of the defendant, to the keeper of the prison, in which the defendant is to be imprisoned.

See *People v. O'Neil*, 47 Hun, 156.

§ 490. Duty of sheriff.—The sheriff or his deputy, while conveying the defendant to the proper prison, in execution of a judgment of imprisonment, has the same authority to require the assistance of any citizen of this state, in securing the defendant, and in retaking him if he escape, as if the sheriff were in his own county; and every person who refuses or neglects to assist the sheriff, when so required, is punishable, as if the sheriff were in his own county.

TITLE X.

GENERAL PROVISIONS IN RELATION TO THE PUNISHMENT OF CRIMES.

CHAPTER I. The death penalty.

II. Second offenses, habitual criminals, and special penal discipline.

CHAPTER I.

THE DEATH PENALTY.

SECTION 491. Warrant for execution of convict.

492. Time of execution.

493. Judge must transmit certain papers to governor.

494. Governor may consult judges, etc.

495. Governor only to reprieve, etc., except as provided in the following sections.

496. If convict becomes insane, sheriff to impanel jury.

497. Duty of district attorney.

498. Inquisition; suspension of execution.

499. Sheriff to transmit inquisition to governor; governor's duty.

500. If female convict is pregnant, sheriff to impanel jury of physicians.

501. Inquisition; suspension of execution.

502. Sheriff to transmit inquisition to governor; governor's duty.

503. When day of execution is passed, convict to be brought up by warrant.

504. Court to inquire, etc.; when to direct execution.

505. Death penalty; mode of infliction.

506. Death penalty; where inflicted.

507. Death penalty; who to be present.

508. Death penalty; certificate after execution.

509. Death penalty; when inflicted by sheriff in an adjoining county.

§ 491. **Warrant for execution of convict.**— When a defendant is sentenced to the punishment of death, the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the sheriff of the county, a warrant, stating the conviction and sentence, and appointing the week within which sentence must be executed. Said warrant must be directed to the agent and warden of the state prison of this state designated by law as the place of confinement for convicts sentenced to imprisonment in a state prison in the judicial district wherein such conviction has taken place, commanding such agent and warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant, the said sheriff must deliver the defendant, together with the warrant, to the agent and warden of the state prison therein named. From the time of said delivery to

the said agent and warden, until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at said state prison, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

See *People, ex rel. Kemmler, v. Durston*, 119 N. Y. 575.

§ 492. Time of execution.— The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence. The time of execution within the said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided.

See *Thomas v. People*, 67 N. Y. 218; *Haggerty v. People*, 53 id. 476; *Matter of Ferris*, 85 id. 262; 82 How. Pr. 411; *People v. Enoch*, 18 Wend. 159; *People, ex rel. Kemmler, v. Durston*, 119 N. Y. 575.

§ 493. Judge must transmit certain papers to governor.— The judge, presiding at the term at which the conviction took place, must immediately thereupon transmit to the governor a statement of the conviction and sentence, with the notes of testimony taken upon the trial by him or the notes, written out, taken by a stenographer or assistant stenographer, attending the court or term pursuant to law.

§ 494. Governor may consult judges, etc.— The governor is authorized to require the opinion of the judges of the court of appeals, justices of the supreme court, and the attorney-general, or of any of them, upon a statement so furnished.

§ 495. Governor only to reprieve, etc., except as provided in the following sections.— No judge, court, or officer, other than the governor, can reprieve or suspend the execution of a defendant sentenced to the punishment of death, except where a sheriff is authorized so to do, in a case and in the manner prescribed in the following sections of this chapter. This section

does not apply to a stay of proceedings upon an appeal or writ of error.

§ 496. **If convict becomes insane, sheriff to impanel jury.**—If, after a defendant has been sentenced to the punishment of death, there is reasonable ground to believe that he has become insane, the sheriff of the county in which the conviction took place, with the concurrence of a justice of the supreme court, or the county judge of the county, who may make an order to that effect, must impanel a jury of twelve persons of that county, qualified to serve as jurors in a court of record, to examine the question of the sanity of the defendant. The sheriff must give at least seven days' notice of the time and place of the meeting of the jury to the district attorney of the county. Section one hundred and eight of the Code of Civil Procedure regulates the impanneling of such a jury and the proceedings upon the inquisition so far as it is applicable.

§ 497. **Duty of district attorney.**—The district attorney must attend the inquiry. He may produce witnesses before the jury; for which purpose he has the same power to issue subpoenas, as for witnesses to attend a grand jury, and disobedience thereto may be punished by the court of oyer and terminer for that county, at any term thereof, in the same manner as disobedience to process issued by that court.

§ 498. **Inquisition; suspension of execution.**—The inquisition of the jury must be signed by the jurors and the sheriff. If it be found by the inquisition that the defendant is insane, the sheriff must suspend execution of the warrant directing the defendant's death, until he receives a warrant from the governor, directing that the defendant be executed.

§ 499. **Sheriff to transmit inquisition to governor; governor's duty.**—The sheriff must immediately transmit the inquisition to the governor, who as soon as he is satisfied of the sanity of the defendant, or of his restoration to sanity, must issue his warrant, appointing a time and place for the execution of the latter, pursuant to his sentence, unless the sentence is commuted or the convict pardoned, and may in the meantime give directions for the disposition and custody of the defendant.

§ 501. **If female convict is pregnant, sheriff to impanel jury of physicians.**— If there is reasonable ground to believe that a female defendant, sentenced to the punishment of death, is pregnant, the sheriff of the county where the conviction took place must impanel a jury of six physicians to inquire into her pregnancy. Sections four hundred and ninety-seven and four hundred and ninety-eight of this Code apply to the proceedings upon the inquisition, except that the sheriff may, in his discretion, require one or more of the physicians composing the jury, to attend from an adjoining county. A physician acting as a juror upon such an inquisition, need not be qualified to serve as a juror in a court of record.

§ 501. **Inquisition; suspension of execution.**— The inquisition of the jury must be signed by the jurors and the sheriff. If it is found by the inquisition that the defendant is quick with child, the sheriff must suspend the execution of the warrant directing her execution until he receives a warrant from the governor directing that the convict be executed.

§ 502. **Sheriff to transmit inquisition to governor; governor's duty.**— The sheriff must immediately transmit the inquisition to the governor, who, as soon as he is satisfied that the defendant is no longer quick with child, may issue his warrant, appointing a time and place for her execution, pursuant to her sentence, or may commute her punishment to imprisonment for life.

§ 503. **When day of execution has passed, convict to be brought up by warrant.**— Whenever, for any reason, other than insanity or pregnancy, a defendant, sentenced to the punishment of death, has not been executed pursuant to the sentence, at the time specified thereby, and the sentence or judgment inflicting the punishment stands in full force, the court of appeals, or a judge thereof, or the supreme court, or a justice thereof, upon application by the attorney-general, or of the district attorney of the county where the conviction was had, must make an order, directed to the agent and warden or the officer in whose custody said defendant may be, commanding him to bring the

convict before the court of appeals or a general term of the supreme court in the department, or a term of the court of oyer and terminer in the county where the conviction was had. If the defendant be at large, a warrant may be issued by the court of appeals, or a judge thereof, or by the supreme court, or a justice thereof, directing any sheriff or other officer to bring the defendant before the court of appeals or the supreme court at a general term thereof, or before a term of the court of oyer and terminer in that county.

See *People v. Riley*, 15 Week. Dig. 204; *People, ex rel., v. Durston*, 119 N. Y. 575.

§ 504. **Court to inquire, etc.; when to direct execution.**—Upon the defendant being brought before the court, it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant to the agent and warden of the state prison mentioned in the original warrant and sentence, under the hands of the judge or judges, or a majority of them, of whom the judge presiding must be one, commanding the agent and warden to do execution of the sentence during the week appointed therein. The warrant must be obeyed by the agent and warden accordingly. The time of execution within said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided.

See *People, ex rel., v. Durston*, 119 N. Y. 575.

When judgment of death has not been executed pursuant to the sentence, the supreme court having the convict brought before them may issue their warrant to the sheriff to do execution upon the sentence at a time therein fixed. *Matter of Ferris*, 35 N. Y. 262; 32 How. Pr. 411.

A court of general sessions has jurisdiction in the case of a conviction in that court of murder in the first degree, after the cause has been remitted back to that court upon an affirmance by the court of appeals, to name the date for the infliction of the death penalty. *People v. Lyons*, 17 State Rep. 768.

§ 505. **Death penalty; mode of infliction.**—The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict, a current of electricity of

sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

This section is not unconstitutional. *People, ex rel. Kemmler, v. Durston*, 119 N. Y. 569; *People v. Kemmler*, id. 586.

§ 506. **Death penalty; where inflicted.**—The punishment of death must be inflicted within the walls of the state prison designated in the warrant, or within the yard or inclosure adjoining thereto.

§ 507. **Death penalty; who to be present.**—It is the duty of the agent and warden to be present at the execution, and to invite the presence, by at least three days' previous notice, of a justice of the supreme court, the district attorney, and the sheriff of the county where the conviction was had, together with two physicians and twelve reputable citizens of full age, to be selected by said agent and warden. Such agent and warden must, at the request of the criminal, permit such ministers of the gospel, priests or clergymen of any religious denomination, not exceeding two, to be present at the execution; and in addition to the persons designated above, he shall also appoint seven assistants or deputy sheriffs who shall attend the execution. He shall permit no other person to be present at such execution except those designated in this section. Immediately after the execution a post-mortem examination of the body of the convict shall be made by the physicians present at the execution, and their report in writing stating the nature of the examination, so made by them, shall be annexed to the certificate herein-after mentioned and filed therewith. After such post-mortem examination, the body, unless claimed by some relative or relatives of the person so executed, shall be interred in the graveyard or cemetery attached to the prison, with a sufficient quantity of quick-lime to consume such body without delay; and no religious or other services shall be held over the remains after such execution, except within the walls of the prison where said execution took place, and only in the presence of the officers of said prison, the person conducting said services and the immediate family and relatives of said deceased prisoner.

Any person who shall violate or omit to comply with any provision of this section shall be guilty of a misdemeanor.

§ 508. Death penalty; certificate after execution.—The agent and warden attending the execution must prepare and sign a certificate, setting forth the time and place thereof, and that the convict was then and there executed, in conformity to the sentence of the court and the provisions of this Code, and must procure such certificate to be signed by all the persons present and witnessing the execution. He must cause the certificate, together with the certificate of the post-mortem examination mentioned in the preceding section, and annexed thereto, to be filed within ten days after the execution in the office of the clerk of the county in which the conviction was had.

§ 509. Death penalty; disability of agent and warden to execute warrant.—In case of the disability, from illness or other sufficient cause, of the agent and warden to whom the death warrant is directed, to be present and execute said warrant, it shall be the duty of the principal keeper of said prison, or such officer of said prison as may be designated by the superintendent of state prisons, to execute the said warrant, and to perform all the other duties by this act imposed upon said agent and warden.

CHAPTER II.

SECOND OFFENSES, HABITUAL CRIMINALS AND SPECIAL PENAL DISCIPLINE.

SECTION 510. When convict may be adjudged an habitual criminal.

511. Judgment accordingly, how entered, etc.

512. Persons so adjudged when liable to arrest and punishment.

513. Persons so adjudged when liable to arrest and punishment; evidence of character on subsequent trial.

514. Persons so adjudged when liable to arrest and punishment; always liable to search, etc.

§ 510. When convict may be adjudged an habitual criminal.—When a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state of

any other crime, he may be adjudged by the court, in addition to other punishment inflicted upon him, to be an habitual criminal. A person convicted of a misdemeanor, who has been already five times convicted in this state of a misdemeanor may be adjudged by the court in addition to, or instead of, other punishment, to be an habitual criminal.

See Penal Code, §§ 690-692.

The act known as the "Habitual Criminal Act" is constitutional. *People v. McCarthy*, 45 How. Pr. 97

§ 511. Judgment accordingly, how entered, etc. — The judgment specified in the last section must be entered in a separate book, kept for that purpose. A copy of the entry, duly certified by the clerk of the court, is proof of the judgment, and a copy, so certified, must be forthwith transmitted to the police department of each city, and to the district attorney of each county in the state.

§ 512. Persons so adjudged when liable to arrest and punishment.— A person who has been adjudged an habitual criminal is liable to arrest summarily with or without warrant, and to punishment as a disorderly person, when he is found without being able to account therefor, to the satisfaction of the court or magistrate, either,

1. In possession of any deadly or dangerous weapon, or of any tool, instrument or material, adapted to, or used by criminals for, the commission of crime; or

2. In any place or situation, under circumstances giving reasonable ground to believe that he is intending or waiting the opportunity to commit some crime.

See § 899, subdiv. 9, *post*.

§ 513. Persons so adjudged when liable to arrest and punishment; evidence of character on subsequent trial. A person who, having been adjudged an habitual criminal, is charged with a crime committed thereafter, may be described in the complaint, warrant or indictment therefor, as an habitual criminal; and, upon proof that he has been adjudged to be such, the prosecution may introduce, upon the trial or examination, evidence as to his previous character, in the same manner and to the same extent as if he himself had first given evidence of his character and put the same in issue.

§ 514. Persons so adjudged when liable to arrest and punishment; always liable to search, etc. — The person and the premises of every one who has been convicted and adjudged an habitual criminal shall be liable at all times to search and examination by any magistrate, sheriff, constable, or other officer, with or without warrant.

TITLE XI.

OF APPEALS.

- CHAPTER** I. Appeals, when allowed, and how taken.
 II. Dismissing an appeal for irregularity.
 III. Argument of the appeal.
 IV. Judgment upon appeal.

CHAPTER I.

APPEALS, WHEN ALLOWED, AND HOW TAKEN.

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 529. Certificate of stay not to be granted, but on notice to district attorney.
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§ 515. Writs of error and of *certiorari* abolished; appeal substituted. — Writs of error and of *certiorari*, in criminal actions, and proceedings and special proceedings of a criminal nature, as they have heretofore existed, are abolished; and here-

after the only mode of reviewing a judgment or order in a criminal action, or special proceeding of a criminal nature, is by appeal.

See *People v. Dempsey*, 56 How. Pr. 378; *People v. Vitan*, 20 Abb. N. C. 298; *Killoran v. Barton*, 26 Hun, 648; *People v. Carney*, 29 id. 47; 1 N. Y. Cr. Rep. 270; *People v. Dempsey*, 31 Hun, 526; 2 N. Y. Cr. Rep. 117; *People v. Havens*, 3 id. 287; 21 Week. Dig. 364; *People v. Palmer*, 109 N. Y. 419; *People, ex rel., v. Walsh*, 33 Hun, 846; 67 How. Pr. 484; 2 N. Y. Cr. Rep. 326; *People, ex rel., v. Kelly*, id. 480; 32 Hun, 538; 97 N. Y. 212; *McKeon v. People*, 1 N. Y. Cr. Rep. 456; 16 Week. Dig. 347; *People, ex rel., v. Superintendent*, 9 State Rep. 608; 45 Hun, 55; *People, ex rel., v. Walsh*, 5 N. Y. Cr. Rep. 527; *Tillotson v. Smith*, 12 State Rep. 331.

§ 516. **Parties, how designated on appeal.**— The party appealing is known as the appellant, and the adverse party as the respondent. But the title of the action is not changed in consequence of the appeal.

§ 517. **In what cases appeal may be taken by defendant.**— An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals, and upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed.

See *People v. Palmer*, 109 N. Y. 419; *People v. Petrea*, 30 Hun, 98, 102; *People v. Mangano*, 29 id. 268; *Ostrander v. People*, id. 519; *People v. Beckwith*, 42 id. 368; 5 N. Y. Cr. Rep. 234; *People v. Osterhout*, 34 Hun, 262; 3 N. Y. Cr. Rep. 446; *People v. McQuade*, 110 N. Y. 284; 21 Abb. N. C. 448; *People v. Lyons*, 17 State Rep. 768; *People v. Bork*, 1 N. Y. Cr. Rep. 398; *People v. Petmecky*, 2 id. 458; *People v. Havens*, 3 id. 287; *People v. Hovey*, 30 Hun, 354, 357; *Shufflin v. People*, 4 id. 16; *People v. Schad*, 58 Hun, 572.

§ 518. **In what cases by the people.**— An appeal to the supreme court may be taken by the people in the following cases, and no other :

1. Upon a judgment for the defendant, on a demurrer to the indictment ;
2. Upon an order of the court arresting the judgment.

An appeal may be taken by the people upon a judgment for the defendant on a demurrer to the indictment. *People v. Callahan*, 29 Hun, 581.

No appeal can be taken by the people from an order in a criminal case setting aside and discharging the grand jury as to a defendant and as to him

quashing the indictment. *People v. Dempsey*, 31 Hun, 526; 2 N. Y. Cr. Rep. 117; 66 How. Pr. 371.

In what cases an appeal may be taken by people in criminal case. *Id.*

No appeal lies by the people from an order granting a new trial upon the ground of newly-discovered evidence. *People v. Beckwith*, 42 Hun, 367; 5 N. Cr. Rep. 233, 235.

No appeal can be taken by the people from a judgment of a court of special sessions reversing on an appeal taken thereto a judgment of a court of special sessions convicting the defendant of an assault. *People v. Snyder*, 44 Hun, 193.

§ 519. In what cases generally.—An appeal may be taken from a judgment or order of the supreme court to the court of appeals in the following cases, and no other:

1. From a judgment affirming or reversing a judgment of conviction;

2. From a judgment affirming or reversing a judgment for the defendant, on a demurrer to the indictment, or from an order affirming, vacating or reversing an order of the court arresting judgment;

3. From a final determination affecting a substantial right of a defendant. [*Amended 1892, ch. 189; in effect March 24, 1892.*]

See *People v. Lawrence*, 107 N. Y. 607; *People v. Boas*, 92 id. 560, 563; *Moett v. People*, 26 Hun, 394; 14 Week. Dig. 125.

An appeal from an order of the general term granting a new trial will not lie to the court of appeals unless the order shows that the new trial was refused upon the facts and was granted only for errors of law. *People v. Poucher*, 99 N. Y. 610; 21 Week. Dig. 410.

An appeal from a judgment in a criminal case brings before the general term for review the decision of a motion for a new trial on the ground that the verdict was against evidence as well as the proceedings upon the trial. *People v. Mangano*, 29 Hun, 259.

§ 520. Appeal in matter of right.—All appeals provided for in this chapter may be taken as a matter of right.

See *People v. Palmer*, 109 N. Y. 419.

§ 521. Must be taken within one year.—An appeal must be taken within one year after the judgment was rendered or the order entered. [*Amended 1892, ch. 189; in effect March 24, 1892.*]

§ 522. Appeal, how taken.—An appeal must be taken by the service of a notice in writing on the clerk with whom the judgment roll is filed, stating that the appellant appeals from the judgment.

§ 523. **Appeal, how taken.**— If the appeal be taken by the defendant a similar notice must be served on the district attorney of the county in which the original judgment was rendered.

§ 524. **Appeal, how taken.**— If it be taken by the people, a similar notice must be served on the defendant, if he be a resident of, or imprisoned in the city or county; or if not, on the counsel, if any, who appeared for him on the trial, if he reside or transact his business in the county. If the service cannot, after due diligence, be made, the appellate court, upon proof thereof, may make an order for the publication of the notice, in such newspaper, and for such time as it deems proper.

See *People v. Snyder*, 44 Hun, 198.

§ 525. **Appeal, how taken.**— At the expiration of the time appointed for the publication, on filing an affidavit of the publication, the appeal becomes perfected.

§ 526. **Appeal by the people, not to stay or affect the judgment until reversed.**— An appeal taken by the people, in no case stays or affects the operation of a judgment in favor of the defendant, until the judgment is reversed.

See *People v. Snyder*, 44 Hun, 198.

§ 527. **Stay of proceedings, on appeal to supreme court from judgment of conviction.**— An appeal to the supreme court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing with the notice of appeal a certificate of the judge who presided at the trial, or of a justice of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise. And the appellate court may order a new trial, if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not, in the court below.

See § 543, *post*; *People v. Beckwith*, 108 N. Y. 76; *People v. Willett*, 1 How. Pr. (N. S.) 196; 8 N. Y. Cr. Rep. 56; *People v. Wentworth*, id. 116; *People v. Newton*, 35 Hun, 606; 3 N. Y. Cr. Rep. 402; *People v. Osterhout*, id. 446; 34 Hun, 262; *People v. Reavey*, 38 id. 426; 4 N. Y. Cr. Rep. 19; *People v. Smith*.

can, id. 198; *People v. Joyce*, id. 345; *People v. Druse*, 5 id. 15; *People v. McInerney*, 5 N. Y. 48; *People v. Meyers*, 7 State Rep. 220; 5 N. Y. Cr. Rep. 124; 7 State Rep. 217; *People v. Shepherd*, 44 Hun, 566; 5 N. Y. Cr. Rep. 138; *Moett v. People*, 14 Week. Dig. 125; *People v. Sweeney*, 41 Hun, 343; 4 N. Y. Cr. Rep. 275; *Horace v. People*, 21 Week. Dig. 111; *People v. Wileman*, 44 Hun, 186; *People v. Thornton*, 46 id. 645; *People v. Emerson*, 20 State Rep. 16; *People v. Huntington*, 17 id. 326; *Shepherd v. People*, 19 N. Y. 545; *Sullivan v. People*, 1 Park. 347; *People v. Hendrickson*, id. 396; *People v. Lohman*, 2 Barb. 450; *People v. Folmsbee*, 60 id. 480; *People v. O'Reilly*, 61 How. Pr. 16.

The power conferred on supreme court by this section is discretionary, and where it does not appear that the discretion has been abused, its decision is not reviewable here. *People v. D'Argencour*, 95 N. Y. 624.

The certificate mentioned in this section can, in a proper case, be given in any case in which an appeal may be taken. *People v. Bork*, 1 N. Y. Cr. Rep. 393. See *People v. Sharp* (Special T., Potter, J.), 9 State Rep. 157.

The case requires the same examination on appeal as if all the objections and exceptions ordinarily used to present the effect of the evidence for review, were taken upon the trial. *People v. Majone*, 12 Abb. N. C. 187; 91 N. C. 211; *People v. Williams*, 29 Hun, 520.

Prior to amendment of 1887, it was held that the operation of this section was confined to the supreme court. *People v. Boas*, 92 N. Y. 563; *People v. Hovey*, id. 554; *People v. Donovan*, 101 id. 632; 4 N. Y. Cr. Rep. 86; 3 How. Pr. (N. S.) 356; *People v. Guidici*, 100 N. Y. 508; 3 N. Y. Cr. Rep. 551; *People v. Petmecky*, id. 268. But see *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 172; 1 N. Y. Cr. Rep. 160.

The powers granted to the court of appeals by this section should be exercised with great circumspection. *People v. Jones*, 3 N. Y. Cr. Rep. 254. See *People v. Greenwall*, 115 N. Y. 520.

In determining whether a new trial should be granted under this section, it is not the province of this court to review and determine controverted questions of fact arising upon conflicting evidence. *People v. Cignarale*, 110 N. Y. 23. See, also, *People v. Kelly*, 113 id. 647; *People v. Stone*, 117 id. 483.

§ 528. Stay, upon appeal to court of appeals from, judgment of supreme court affirming judgment of conviction.—An appeal to the court of appeals, from a judgment of the supreme court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the court of appeals or of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise. When the judgment is of death an appeal to the court of appeals stays the execution of course until the determination of the appeal. When the judgment is of death the court of appeals may order a new trial, if it be satisfied that the verdict

was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not, in the court below.

See *Moett v. People*, 14 Week. Dig. 125; *People v. Hovey*, 92 N. Y. 554; *People v. Willett*, 3 N. Y. Cr. Rep. 56; *People v. Greenwall*, 115 N. Y. 520; *People v. Willson*, 109 id. 349; *People v. Van Brunt*, 108 id. 657.

In *People v. Driscoll*, 107 N. Y. 417, the court say: "This provision (the above section) has very much enlarged the jurisdiction and the labors of this court, and requires us to review the facts in every capital case, and to determine whether, upon all the evidence, there is, in our opinion, good and sufficient reason for setting aside the verdict of the jury and granting a new trial. The powers conferred by this section are similar to those formerly given to this court in certain cases by chapter 387 of the Laws of 1855, as amended by chapter 330 of the Laws of 1858, and to the supreme court by section 527 of the Code of Criminal Procedure. *O'Brien v. People*, 86 N. Y. 276."

In *People v. Lyons*, 110 N. Y. 618, it was held that a defendant cannot claim as matter of right the benefit of error occurring on the trial where no proper objection was made and no exception taken; he can only ask the court to determine on the whole case the question as to whether justice requires a new trial or not, or whether the verdict was against the weight of evidence or against law.

In *People v. Kelly*, 113 N. Y. 647, it was held that this section does not authorize a review of findings of fact of a jury, founded on sufficient evidence, or a reversal simply because of a difference of opinion on the facts between the court and the jury; it simply invests the court with power to order a new trial where, upon a consideration of the whole case, it is manifest injustice has been done, although the question has not been properly raised by exceptions. See *People v. Beckwith*, 103 N. Y. 369; *People v. Stone*, 117 id. 483; *People v. Fish*, 125 id. 144.

On an application for stay on ground of reasonable doubt, etc., under this section, the main inquiry should be as to whether the individual judge has a reasonable doubt as to whether the judgment should stand. *Bragle v. People*, 10 Abb. N. C. 300; 26 Hun, 878; affirmed, 88 N. Y. 585; 63 How. Pr. 143.

§ 529. Certificate of stay not to be granted, but on notice to district attorney.—The certificate mentioned in the last two sections cannot, however, be granted upon an appeal on a conviction of felony, until such notice as the judge may prescribe has been given to the district attorney of the county where the conviction was had, of the application for the certificate. But the judge may stay the execution of the judgment in the meantime.

See *People v. Petmecky*, 2 N. Y. Cr. Rep. 453; *People v. Wentworth*, 3 id. 116; *People v. Sweeney*, 41 Hun, 343; 4 N. Y. Cr. Rep. 286; *People v. Dimick*, 107 N. Y. 13.

§ 530. Effect of the stay.— If the certificate, provided in sections five hundred and twenty-seven and five hundred and twenty-eight, be given, the sheriff must, if the defendant be in his custody, upon being served with a copy of the order, keep the defendant in his custody, without executing the judgment, and detain him to abide the judgment upon the appeal.

See *People v. McTameny*, 80 Hun, 506.

§ 531. Effect of the stay.— If, before the granting of the certificate, the execution of the judgment have commenced, the further execution thereof is suspended, and the defendant must be restored by the officer in whose custody he is, to his original custody.

See *People v. McTameny*, 80 Hun, 506.

§ 532. Transmitting the papers to the appellate court.— Upon the appeal being taken, the clerk, with whom the notice of appeal is filed, must, within ten days thereafter, without charge, transmit a copy of the notice of appeal and of the judgment roll, as follows :

1. If the appeal be to the supreme court, to the clerk of that court, where the next general term in the district is to be held ;

2. If it be to the court of appeals, to the clerk of that court.

See *People v. McTameny*, 80 Hun, 506.

CHAPTER II

DISMISSING AN APPEAL FOR IRREGULARITY.

SECTION 533. For what irregularity, and how dismissed.

534. Dismissal for want of return.

§ 533. For what irregularity, and how dismissed.— If the appeal be irregular in a substantial particular, but not otherwise, the court may, on any day in term, on motion of the respondent, upon five days' notice, served with copies of the papers on which the motion is founded, order it to be dismissed.

§ 534. Dismissal for want of return.— The court may also, upon like motion, dismiss the appeal, if the return be not made, as provided in section five hundred and thirty-two, unless for good cause they enlarge the time for that purpose.

CHAPTER III.

ARGUMENT OF THE APPEAL.

- SECTION 535.** Appeal to supreme court, how and where brought to argument.
536. Appeal to court of appeals, how brought to argument.
537. Notice of argument to counsel for defendant.
538. Papers, by whom furnished, and effect of omission.
539. Judgment of affirmance may be without argument, if appellant fail to appear; reversal, only upon argument, though respondent fail to appear.
540. Number of counsel to be heard; defendant's counsel to close the argument.
541. Defendant need not be present.

§ 535. Appeal to supreme court, how and where brought to argument.—An appeal to the supreme court may be brought to argument by either party, on ten days' notice, on any day, at a general term held in the department in which the original judgment was given.

See Code Civ. Proc., § 790; Sup. Ct. Rule 43; *Barron v. People*, 1 Barb. 136.

§ 536. Appeal to court of appeals, how brought to argument.—An appeal to the court of appeals may, in the same manner, be brought to argument by either party, on any day in term.

§ 537. Notice of argument to counsel for defendant.—If a counsel, within five days after the appeal, have given notice to the district attorney, that he appears for the defendant, notice of argument must be served on him, instead of the defendant; otherwise, notice must be served as the court may direct.

§ 538. Papers, by whom furnished, and effect of omission.—When the appeal is called for argument, the appellant must furnish the court with copies of the notice of appeal and judgment-roll, except where the judgment is of death. If he fail to do so, the appeal must be dismissed, unless the court otherwise direct.

§ 539. Judgment of affirmance may be without argument, if appellant fail to appear; reversal, only upon argument, though respondent fail to appear.—Judgment

of affirmance may be given, without argument, if the appellant fail to appear. But judgment of reversal can only be given upon argument, though the respondent fail to appear.

See *People v. Bradner*, 44 Hun, 285; 107 N. Y. 1; *Barron v. People*, 1 Barb. 136.

§ 540. **Number of counsel to be heard; defendant's counsel to close the argument.** — Upon the argument of the appeal, if the crime be punishable with death, two counsel on each side must be heard if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side. The counsel for the defendant is entitled to the closing argument.

§ 541. **Defendant need not be present.** — The defendant need not personally appear in the appellate court.

See *People v. Clark*, 1 Park. 360; reversed, 7 N. Y. 385, without noticing this point.

A prisoner in criminal proceedings can take no action before the court where he has escaped out of custody and still remains at large. *People v. Genet*, 59 N. Y. 80; 17 Am. Rep. 315; *Matter of O'Byrne*, 55 Hun, 438; *Warwick v. State*, 73 Ala. 486; 49 Am. Rep. 59; *Sargent v. State*, 96 Ind. 93; 5 Crim. Law Mag. 709; *Smith v. United States*, 94 U. S. 97; *Wilson v. Com.*, 10 Bush, 526; 19 Am. Rep. 76; *People v. Redinger*, 55 Cal. 290; 36 Am. Rep. 82; *M'Gowan v. People*, 104 Ill. 100; 44 Am. Rep. 87. See, also, 41 Am. Dec. 272; 9 Crim. Law Mag. 439; 30 Eng. Rep. 518.

CHAPTER IV.

JUDGMENT, UPON APPEAL.

SECTION 542. Court to give judgment, without regard to technical errors, defects or exceptions, not affecting substantial rights.

543. May reverse, affirm or modify the judgment, and order a new trial.

544. New trial.

545. Defendant to be discharged on reversal of judgment against him, where new trial is not ordered.

546. Judgment to be executed, on affirmance against the defendant.

547. Judgment of appellate court, how entered and remitted.

548. Papers returned, not to be remitted.

549. Jurisdiction of appellate court ceases, after judgment remitted.

§ 542. **Court to give judgment without regard to technical errors, defects or exceptions, not affecting substantial rights.** — After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

See §§ 285, 684 ; *People v. Hagan*, 37 State Rep. 661.

The error complained of must have been actually prejudicial to the prisoner. *People v. Ransom*, 7 Wend. 417; *Eastwood v. People*, 3 Park. 25; *People v. Montgomery*, 13 Abb. Pr. 207; *Beebe v. People*, 5 Hill, 32; *People v. Hartung*, 4 Park. 256; 17 How. Pr. 85; *Wilson v. People*, 4 Park. 619; 8 Abb. Pr. 187; *People v. Gaffney*, 14 id. 36; *People v. Gray*, 5 Wend. 289; *Eggler v. People*, 56 N. Y. 642; *People v. Burns*, 38 Hun, 300; 2 N. Y. Cr. Rep. 427; *People v. Osterhout*, 3 id. 445; 34 Hun, 260; *People v. Irving*, 2 N. Y. Cr. Rep. 47; 31 Hun, 614; 95 N. Y. 141; *People v. Bork*, 81 Hun, 360; *People v. Buddensieck*, 103 N. Y. 487, 500; *People v. Myers*, 5 N. Y. Cr. Rep. 125; *People v. Sharp*, 45 Hun, 499, 518; *People v. Willett*, 27 id. 471; *People v. Wentworth*, 4 N. Y. Cr. Rep. 214; *People v. Druse*, 5 id. 33; *People v. Johnson*, 104 N. Y. 213; 5 N. Y. Cr. Rep. 221; *People v. Richards*, 44 Hun, 278; 5 N. Y. Cr. Rep. 371; *People v. Connor*, 53 Hun, 356; *People v. McQuade*, 110 N. Y. 284; 21 Abb. N. C. 419, 433, 435, 436, 449; *People v. Upton*, 29 State Rep. 779; 4 N. Y. Cr. Rep. 149; *People v. Menken*, 36 Hun, 91; 3 N. Y. Cr. Rep. 233; *People v. Chacon*, 102 N. Y. 669; 4 N. Y. Cr. Rep. 173; *People v. Riley*, 3 id. 374; *People v. Dimick*, 107 N. Y. 13; *People v. Urleman*, 44 Hun, 187; *Cox v. People*, 80 N. Y. 500; *Schrumpf v. People*, 14 Hun, 10.

§ 543. **May reverse, affirm or modify the judgment, and order a new trial.** — Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, correct the judgment to conform to the verdict; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal may, if necessary or proper, order a new trial.

See § 527, ante; *People v. Bradner*, 107 N. Y. 12; *People v. Palmer*, 109 id. 419; 5 N. Y. Cr. Rep. 108; 43 Hun, 408; *People, ex rel., v. Risley*, 47 N. Y. Cr. Rep. 111; 38 Hun, 282; *People, ex rel., v. Kelly*, 2 N. Y. Cr. Rep. 480; 32 Hun, 538; 97 N. Y. 212.

It is the duty of the appellate court, under this section, to correct a judgment so that it will conform to the verdict where an erroneous judgment has been entered upon a lawful verdict. *People v. Griffin*, 27 Hun, 595.

Where the conviction is unassailed, and the judgment is reversed for error in the sentence, the appellate court should remit the record to the court in which the conviction was had, to pass such sentence as the appellate court directs. *People v. Bauer*, 3 N. Y. Cr. Rep. 434. See, also, *People v. Bork*, 2 id. 177.

§ 544. New trial. — When a new trial is ordered, it shall proceed in all respects as if no trial had been had.

See § 462, *ante*.

In *People v. Oignarale*, 110 N. Y. 83, the court say: "We deem it unnecessary to consider whether the legislature by sections 464 and 544 of the Code of Criminal Procedure have changed the rule that a conviction for a lesser grade of an offense, or of one or two offenses charged in an indictment, imports an acquittal of the higher grade of the offense or of the other distinct offense." But see *People v. Palmer*, 109 N. Y. 418; 5 N. Y. Cr. Rep. 109.

§ 545. Defendant to be discharged on reversal of judgment against him, where new trial is not ordered. — If a judgment against the defendant be reversed, without ordering a new trial, the appellate court must direct, if he be in custody, that he be discharged therefrom, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to the defendant.

See *People v. Johnson*, 4 N. Y. Cr. Rep. 591.

§ 546. Judgment to be executed on affirmance against the defendant. — On a judgment of affirmance against the defendant, the original judgment must be carried into execution as the appellate court may direct, and if the defendant be at large, a bench warrant may be issued for his arrest. If a judgment be corrected, the corrected judgment must be carried into execution as the appellate court may direct.

§ 547. Judgment of appellate court, how entered and remitted. — When the judgment of the appellate court is given, it must be entered in the judgment book, and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment roll is filed, or, if a new trial be ordered in another county, to the clerk of that county, unless the judgment be rendered in the absence of the adverse party, in which case, the court may direct it to be retained, not exceeding ten days.

§ 548. Papers returned to be remitted. — The decision of the court and the return shall be remitted to the court below in the same form and manner as in civil actions.

§ 549. Jurisdiction of appellate court ceases, after judgment remitted. — After the certificate of the judgment has been remitted, as provided in section five hundred and forty-seven, the appellate court has no further jurisdiction of the appeal, or of the proceedings thereon; and all orders, which may be necessary to carry the judgment into effect, must be made by the court to which the certificate is remitted, or by any court to which the cause may thereafter be removed.

TITLE XII.

OF MISCELLANEOUS PROCEEDINGS.

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- II. Compelling the attendance of witnesses.
- III. Examination of witnesses, conditionally.
- IV. Examination of witnesses, on commission.
- V. Inquiry into the insanity of the defendant, before or during the trial, or after conviction.
- VI. Compromising certain crimes, by leave of the court.
- VII. Dismissal of the action, before or after the indictment for want of prosecution or otherwise.
- VIII. Remitting the punishment, in certain cases.
- IX. Proceedings against corporations.
- X. Entitling affidavits.
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- XII. Disposal of property, stolen or embezzled.
- XIII. Reprieves, commutations and pardons.

CHAPTER I.

BAIL.

ARTICLE I. In what cases the defendant may be admitted to bail.

- II. Bail, upon being held to answer, before indictment
- III. Bail, upon an indictment, before conviction.
- IV. Bail, upon an appeal.
- V. Deposit, instead of bail.
- VI. Surrender of the defendant.
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- VIII. Re-commitment of the defendant, after having given bail, or deposited money instead of bail.

ARTICLE I.

IN WHAT CASES THE DEFENDANT MAY BE ADMITTED TO BAIL.

SECTION 550. Admission to bail, defined.

551. Taking bail, defined.

552. Offenses not bailable.

553. In what cases defendant may be admitted to bail, before conviction.

554. In what cases he may be admitted to bail, after conviction and upon appeal.

555. Nature of bail before conviction.

556. Nature of bail after conviction and upon appeal.

§ 550. **Admission to bail, defined.**— When the defendant is held to appear for examination, bail for such appearance may be taken either,

1. By the magistrate who issued the warrant or before whom the same is returnable; or,
2. By any judge of the supreme court.

§ 551. **Taking bail, defined.**— The taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the people of this state a specified sum.

Article 1, section 5 of the state constitution provides that excessive bail shall not be required, nor excessive fines imposed.

The provision as to excessive bail applies only to criminal proceedings. *People v. Tweed*, 13 Abb. Pr. (N. S.) 148.

The right to bail existed at common law. *People v. Huggins*, 10 Wend. 465.

The power to admit to bail is incident to the right to hear and determine the offense. *People v. Van Horne*, 8 Barb. 158; *People v. Goodwin*, 1 Wheel. C. C. 434; *People v. Shattuck*, 6 Abb. N. C. 83.

§ 552. **Offenses not bailable.**— The defendant cannot be admitted to bail except by a judge of the supreme court or by a court of oyer and terminer where he is charged,

1. With a crime punishable with death, or
2. With the infliction of a probably fatal injury upon another, and under such circumstances as that, if death ensue, the crime would be murder.

If facts do not sustain the charge of murder contained in a warrant, bail may be allowed. *People v. Sheriff of Westchester*, 1 Park. 159; 10 N. Y. Leg. Obs. 298; *People v. Porter*, 8 Barb. 168, note.

In a case of manslaughter where there is no reasonable doubt of the prisoner's guilt, bail will not be allowed. *Ex parte Tayloe*, 5 Cow. 39.

Even in a capital case bail ought to be allowed, unless the proof be evident and the presumption great. *People v. Perry*, 8 Abb. 27; *People v. Hyler*, 2 Park. 570; *People v. Van Horne*, 8 Barb. 158; *People v. Cole*, 6 Park. 695; 4 Abb. (N. S.) 280.

That a case has been twice tried and the jury in both cases disagreed, presents a proper case for admitting to bail. *People v. Perry*, 8 Abb. Pr. (N. S.) 27.

On a question of bail in a case of homicide the court will look into the examination taken before the coroner. *People v. Beigler*, 3 Park. 316.

Should be admitted to bail even in a capital case after indictment, if the evidence be not such as to make out a *prima facie* case of guilt. *People v. Baker*, 10 How. Pr. 567.

In a capital case a prisoner committed by a regular inquisition of a coroner's jury, if it appear that there is probable cause of guilt, will not be bailed. *People v. Collins*, 20 How. Pr. 111; 11 Abb. 106.

In a capital case, after a bill found, the prisoner will not be admitted to bail where it is believed the evidence would warrant a conviction. *People v. Shattuck*, 6 Abb. N. C. 33.

§ 553. In what cases defendant may be admitted to bail, before conviction.—If the charge be for any other crime, he may be admitted to bail, before conviction, as follows :

1. As a matter of right, in cases of misdemeanor;
2. As a matter of discretion, in all other cases.

See *People v. Navagh*, 4 N. Y. Cr. Rep. 299; *Matter of Thomas*, 2 N. Y. Supp. 39.

A justice of the supreme court has no power to let a prisoner to bail while a court is in session having jurisdiction to try the indictment. *People, ex rel. Sherwin, v. Mead*, 28 Hun, 227; 92 N. Y. 415.

§ 554. In what cases he may be admitted to bail, after conviction and upon appeal.—Before conviction, a defendant may be admitted to bail :

1. For his appearance before the magistrate on the examination of the charge, before being held to answer;
2. To appear at the court to which the magistrate is required by section two hundred and twenty-one to return the depositions and statements upon the defendant being held to answer after examination;
3. After indictment either upon the bench warrant issued for his arrest or upon an order of the court committing him or enlarg-

ing the amount of bail, or upon his being surrendered by his bail, to answer the indictment in the court in which it is found, or to which it may be sent or removed for trial. And any captain or sergeant of police in any city or village of this state may take bail for appearance before a competent and accessible magistrate the next morning from any person arrested for a misdemeanor between two o'clock in the afternoon and eight o'clock the next morning, if a magistrate competent to take the bail be not found within an hour after the arrest. When such captain or sergeant of police takes bail he must take it by an undertaking in the form in this section mentioned, executed in his presence by the defendant and at least one surety who must justify under oath, and for that purpose the officer may administer the oath. The amount of bail taken by a captain or sergeant of police under this section must be as follows: If the offense be the violation of a corporation ordinance, the amount of the bail must be one hundred dollars, except that if a conviction upon the charge would render the defendant liable only for a fine, the amount of the bail must be double the largest fine that could be imposed; if the conviction would render him liable to imprisonment for thirty days or less, the amount of bail must be two hundred dollars. In all other cases the amount of bail must be five hundred dollars. The form of the undertaking must be as follows:

We, A. B., defendant, and , residing at number , in , and C. D., defendant, residing at , hereby jointly and severally undertake that the above A. B., defendant, shall appear and answer the complaint [describing it briefly] before the magistrate before whom he would be arraigned if not bailed on the day of , eighteen hundred and , at o'clock, to answer to the complaint, and there remain to answer, subject to any order of the magistrate, and render himself in execution thereof, or if he fail to perform either of these conditions, then we will pay to the people of the state of New York the sum of

See *Babcock's Case*, 2 Abb. Pr. (N. S.) 204; *People v. Beigler*, 3 Park. 316; *Matter of Tayloe*, 5 Cow. 39; *People v. Dixon*, 3 Abb. Pr. 395; 4 Park. 651; *People v. Clews*, 14 Hun. 90; 20 Alb. L. J. 36; *Matter of Gorsline*, 21 How. Pr. 85; 10 Abb. Pr. 282; *People v. Dixon*, 3 Abb. 395; *People v. McLeod*, 25 Wend. 488, 568; 1 Hill, 877.

§ 555. **Nature of bail after conviction.** — After the conviction of a crime not punishable with death, a defendant who has appealed, and when there is a stay of proceedings, but not otherwise, may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only;
2. As a matter of discretion in all other cases.

§ 556. **Nature of bail after conviction and upon appeal.** After conviction and upon an appeal, the defendant may be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment be affirmed or modified or the appeal be dismissed;
2. If judgment of imprisonment have been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed

See *People v. Bauman*, 3 N. Y. Cr. Rep. 457.

ARTICLE II.

BAIL, UPON BEING HELD TO ANSWER, BEFORE INDIOTMENT.

SECTION 557, 558. By what courts or magistrates defendant may be admitted to bail.

559. At what time defendant may be admitted to bail by a magistrate.

560. In cities, if crime be felony, application for admission to bail must be on notice

561. Form of order, if made by the court.

562. Form of order, if made by a magistrate.

563. If application be denied by a magistrate, no subsequent application can be made to another magistrate.

564. Violation of last section a misdemeanor; admission to bail in such case, how revoked or vacated.

565. Construction of last two sections.

566. Decision final.

567. Bail, by whom taken.

568. How put in; and form of undertaking.

569. Qualifications of bail.

570-572. Bail, how to justify.

573. Bail may be examined as to sufficiency.

SECTION 574. Other testimony may be received as to their sufficiency.

575. Decision as to their sufficiency; and filing affidavits of justification and undertaking.

576. On allowance of bail and execution of undertaking, defendant to be discharged; form of discharge.

577. If bail disallowed.

§ 557. By what courts or magistrates defendant may be admitted to bail.— When the defendant has been held to answer, as provided in section two hundred and eight, the admission to bail may be by the magistrate by whom he is so held, if he be one of the magistrates mentioned in section one hundred and forty-seven, and the crime charged is a misdemeanor, or a felony punishable with imprisonment, not exceeding five years; or if he be a judge of the supreme court, or any judge authorized to preside in a court having jurisdiction to try indictments, in all cases where bail may be taken before conviction, as provided in section five hundred and fifty-four.

After indictment found in the general sessions any one justice of the peace, as a member of that court, has power to admit to bail for any offense there triable. *People v. Huggins*, 10 Wend. 464.

The power of taking a recognizance of bail may be conferred upon any local officer appointed to discharge the duties of county judge. *People v. Main*, 20 N. Y. 484.

Where a defendant is arrested on a warrant, indorsed by a justice of another county, he cannot be let to bail in the county where he was arrested. *Clark v. Cleveland*, 6 Hill, 344. *Contra, Doyle v. Russell*, 30 Barb. 300.

A person arrested on a bench warrant cannot be let to bail before being taken to the county where he was indicted. *Ex parte Gorsline*, 21 How. Pr. 85; 10 Abb. Pr. 282; *People v. Chapman*, 30 How. Pr. 202.

After indictment found, a justice of the supreme court has no power to let to bail during the session of the court having jurisdiction to try the indictment. *Ex parte Babcock*, 2 Abb. Pr. (N. S.) 204.

A defendant arrested on a bench warrant may be let to bail by any justice of the supreme court, if the court having cognizance of the indictment be not then in session. *People v. Clews*, 14 Hun, 90; 20 Alb. L. J. 36; 77 N. Y. 89.

Under act of 1876, chap. 21, a police magistrate has power to admit a prisoner to bail pending an examination before him. *Ex parte Gesmer*, 53 How. Pr. 515.

§ 558. By what courts or magistrates defendant may be admitted to bail.— When, by reason of the degree of the crime, the committing magistrate has not authority to admit to bail, the defendant may be admitted to bail by one of the officers having authority to admit to bail in the case, as provided in the second subdivision of the last section, or by the court to which

the depositions and statements are returned by the committing magistrate, as provided in section two hundred and twenty one, if the case be triable therein, or if not, by the court to which, after indictment, it may be sent or removed for trial.

§ 559. **At what time defendant may be admitted to bail by a magistrate.** — The defendant may be admitted to bail by a magistrate, as provided in the last two sections, upon being held to answer, or at any time before the return of the depositions and statement to the court. After that time he can be admitted to bail only by a judge presiding in the court in which the crime is triable, if it be sitting, or if not, by one of the magistrates mentioned in the second subdivision of section five hundred and fifty-seven.

See *Ex parte Babcock*, 2 Abb. Pr. (N. S.) 204; *People v. Oles*, 77 N. Y. 89.

§ 560. **In cities, if crime be felony, application for admission to bail must be on notice.** — In the several cities of this state, if the crime charged be a felony, the application for admission to bail must be upon notice of at least two days, to the district attorney of the county, unless the magistrate, by order, fixes a shorter time; and the committing magistrate, upon the like notice in writing, requiring him to do so, must transmit the depositions and statement, or a copy thereof, to the court or magistrate to whom the application for bail is to be made.

§ 561. **Form of order, if made by the court.** — If the application be to the court, an order must be made granting or denying it, and if it be granted, stating the sum in which bail may be taken.

§ 562. **Form of order, if made by a magistrate.** — If the application be to a magistrate, he must certify, in writing, his decision granting or denying the same; and if he grant the application, must state in the certificate the sum in which bail may be taken; which certificate he must cause to be forthwith filed with the clerk of the court to which the depositions and statement are required to be sent.

§ 563. **If application be denied by a magistrate, no subsequent application can be made to another magistrate.** If an application for admission to bail, made to a magistrate, be

denied, not more than two subsequent applications therefor can be made to other magistrates, except that an application can be made to any magistrate mentioned in subdivision two of section five hundred and fifty-seven, if no application has been previously made to a magistrate mentioned therein.

§ 564. **Violation of last section a misdemeanor; admission to bail in such case, how revoked or vacated.**—A violation of the last section is punishable as a misdemeanor, and the admission of the defendant to bail contrary thereto may be revoked by the magistrate who made it, or vacated by the court to which the depositions and statement are or must be sent, as provided in section two hundred and twenty-one or to which, after indictment, the action must be sent for trial.

§ 565. **Construction of last two sections.**—The provisions of the last two sections shall not be construed to limit the power of any judge presiding in the court in which the offense is triable to let the defendant to bail.

§ 566. **Decision final.**—The decision of the judge presiding in the court in which the crime is triable, granting or denying bail, is final, except as provided in section five hundred and sixty-three.

§ 567. **Bail, by whom taken.**—If the defendant be admitted to bail by a magistrate, the bail must be taken by the magistrate granting the order, unless the order shall specify that the same may be taken by some other designated magistrate.

§ 568. **How put in; and form of undertaking.**—Bail is put in by written undertaking executed by sufficient surety [with or without the defendant, in the discretion of the magistrate], and acknowledged before the magistrate in substantially the following form :

"An order having been made on the day of , eighteen hundred and , by A. B., a justice of the peace of the town of [or as the case may be], that C. D. be held to answer upon a charge of [stating briefly the nature of the crime], upon which he has been duly admitted to bail in the sum of dollars.

"We, [C. D., defendant, if the defendant join in the undertaking], of [stating his place of residence and his occupation] and E. F., [and G. H. stating place of residence and occupation] surety or sureties [as the case may be], hereby undertake, jointly and severally, that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted; and shall at all times render himself amenable to the orders and process of the court; and, if convicted, shall appear for judgment, and render himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars" [inserting the sum in which the defendant is admitted to bail].

See *People, ex rel. Gilbert, v. Laidlaw*, 102 N. Y. 591; *People v. Gillman*, 125 id. 372.

§ 569. **Qualifications of bail.** — The qualifications of bail are as follows:

1. He must be a resident, and a householder or freeholder within the state, and, unless the magistrate otherwise direct, within the county;

2. He must be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the magistrate, on taking bail, may require two sureties, or may allow two or more to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of one sufficient surety.

"In no case shall an attorney or counselor be surety on any undertaking or bond required by law, or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case, or proceeding." Sup. Ct. Rule 5 (Hun's ed., p. 73), and cases cited.

§ 570. **Bail, how to justify.** — Except as prescribed in the next section, the bail may, in the exercise of a just discretion, be taken, and may justify, without notice to the district attorney, or reasonable notice of the intention to give bail may be required by the court or magistrate, to be given to the district attorney. When given, the notice shall be as prescribed in the next section.

§ 571. **Bail, how to justify.** — In the several cities of this state, if the crime charged be a felony, a previous notice in writing of at least two days, of the time and place of giving the bail, must be served upon the district attorney of the county, stating:

1. The names, places of residence and occupations of the proposed surety or sureties ;

2. A general description of the real or personal property of the surety or sureties, in respect to which they propose to justify as to their sufficiency, with the incumbrances thereon, by mortgage, judgment or otherwise, if any.

The district attorney may waive the giving of the notice herein provided for, or a shorter time than two days may be directed by the court or magistrate requiring the notice.

§ 572. Bail, how to justify. — The surety or sureties must in all cases justify by affidavit, taken before the magistrate. The affidavit must state that each of the sureties possesses the qualifications provided in section five hundred and sixty-nine.

Perjury may be predicated on a false affidavit made in justification of bail. *Stratton v. People*, 20 Hun, 288; 81 N. Y. 629.

§ 573. Bail may be examined as to sufficiency. — The district attorney, or the magistrate, may thereupon further examine the sureties upon oath, concerning their sufficiency, in such manner as the magistrate may deem proper. The questions put to the sureties, and their answers, must be reduced to writing, and must be subscribed by them.

§ 574. Decision as to their sufficiency, and filing affidavits of justification and undertaking. — The magistrate may also receive other testimony, either for or against the sufficiency of the bail, and may, from time to time, adjourn the taking of bail, to afford an opportunity of proving or disproving its sufficiency.

§ 575. When the examination is closed, the magistrate must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification and the undertaking of bail, to be filed with the clerk of the court to which the depositions and statement must be sent, as prescribed in section two hundred and twenty-one.

§ 576. On allowance of bail and execution of undertaking, defendant to be discharged ; form of discharge. — Upon the allowance of the bail and the execution of the undertaking, the court or magistrate must make an order, signed by

him, with his name of office, for the discharge of the defendant, to the following effect :

“ To the sheriff of the county of _____, [or, in the city and county of New York, ‘to the keeper of the city prison of the city of New York :’] A. B., who is detained by you on a commitment to answer a charge for the crime of [designating it generally], having given sufficient bail to answer the same, you are commanded forthwith to discharge him from your custody.”

§ 577. **If bail disallowed.**— If the bail be disallowed, the defendant must be detained in custody until lawfully discharged.

ARTICLE III.

BAIL, UPON AN INDICTMENT BEFORE CONVICTION.

SECTION 578. In misdemeanor, officer to take defendant before a magistrate.

579. In felony, to deliver him into custody.

580. Taking bail, when offense is bailable.

581. Bail, how put in; form of undertaking.

582. Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.

§ 578. **In misdemeanor, officer to take defendant before magistrate.** — When the crime charged in the indictment is a misdemeanor, the officer serving the bench warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail as prescribed in sections three hundred and two and three hundred and five.

A person arrested on a bench warrant cannot be let to bail before being taken to the county where he was indicted. *Ex parte Gorsline*, 21 How. Pr. 85; 10 Abb. Pr. 282; *People v. Chapman*, 30 How. Pr. 202. See, also, *People v. Folmes*, 60 Barb. 480.

§ 579. **In felony, to deliver him into custody.** — If the crime charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody, according to the command of the bench warrant, as prescribed in section three hundred and one.

See *People v. Clews*, 14 Hun. 90; 77 N. Y. 39.

§ 580. **Taking bail, when offense is bailable.**— When the defendant is so delivered into custody, if the felony charged be bailable, and the amount of bail have been fixed, bail may be taken by the judge presiding in the court in which the indictment was found, or to which it is sent or removed, or by any magistrate in the county belonging to the class mentioned in the second subdivision of section five hundred and fifty-seven.

§ 581. **Bail, how put in; form of undertaking.**— The bail must be put in by a written undertaking, executed by a sufficient surety, with or without the defendants, in the discretion of the magistrate, and acknowledged before the court or its clerk in open court or the magistrate in substantially the following form:

“An indictment having been found on the day of , eighteen hundred and , in the *court of sessions of the county of Albany* [or as the case may be] charging A. B. with the crime of [designating it generally], and he having been duly admitted to bail in the sum of dollars.

“We, A. B., defendant [if the defendant join in the undertaking], and C. D., surety or sureties, as the case may be, of [stating his place of residence and occupation], and E. F., of [stating his place of residence and occupation], hereby jointly and severally undertake that the above-named A. B. shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and if convicted, shall appear for judgment, and render himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars” [inserting the sum in which the defendant is admitted to bail.]

See § 593, *post*; *People v. Hammond*, 26 State Rep. 486.

§ 582. **Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.**— The provisions contained in sections five hundred and sixty-nine to five hundred and seventy-seven, both inclusive, apply to the qualifications of the sureties, and to all the proceedings respecting the putting in and justification of bail, and incidental thereto.

ARTICLE IV.

BAIL UPON AN APPEAL.

SECTION 583. Who may admit to bail.

584. Notice of the application, when required.

585. Qualifications of bail, and how put in.

§ 583. Who may admit to bail. — In the cases in which the defendant may be admitted to bail upon an appeal, as provided in section five hundred and fifty-six, the order admitting him to bail may be made, either by the court from which the appeal is taken, or the presiding judge thereof, or by the appellate court, or a judge thereof, or by a judge of the supreme court.

§ 584. Notice of the application, when required. — The court or officer to whom the application for bail is made may require such notice thereof as he deems reasonable, to be given to the district attorney of the county in which the verdict or judgment was originally rendered.

§ 585. Qualifications of bail, and how put in. — The sureties must possess the qualifications, and the bail must be put in all respects, in the manner prescribed by sections five hundred and sixty-nine to five hundred and seventy-seven, both inclusive; except that the undertaking must be to the effect that the defendant will, in all respects, abide the orders and judgment of the appellate court upon the appeal.

ARTICLE V.

DEPOSIT INSTEAD OF BAIL.

SECTION 586. Deposit, when and how made.

587. May be made after bail given, and before forfeiture; and in such case bail discharged.

588. Bail may be given after deposit; and in such case money deposited to be refunded.

589. Deposit to be applied to payment of judgment of fine, and surplus to be refunded.

§ 586. **Deposit, when and how made.**—The defendant, at any time after an order admitting him to bail, instead of giving bail, or a witness committed in default of an undertaking to appear and testify, instead of entering into such an undertaking, may deposit with the county treasurer of the county in which he is held to answer or appear, the sum mentioned in the order or commitment; and upon delivering to the officer, in whose custody he is, a certificate of the deposit, he must be discharged from custody. [*Amended 1892, ch. 220; in effect April 5, 1892.*]

See Egan v. Stevens, 89 Hun, 314; *People v. Laidlaw*, 102 N. Y. 588.

§ 587. **May be made after bail given, and before forfeiture; and in such case bail discharged.**—If the defendant have given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking; and upon the deposit being made the bail is exonerated.

See People v. Laidlaw, 102 N. Y. 591.

§ 588. **Bail may be given after deposit; and in such case money deposited to be refunded.**—If money be deposited, as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail, at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken must thereupon direct, in the order of allowance, that the money deposited be refunded by the county treasurer to the defendant; and it must be refunded accordingly.

See People v. Laidlaw, 102 N. Y. 588.

§ 589. **Deposit to be applied to payment of judgment of fine, and surplus to be refunded.**—When money has been deposited, if it remain on deposit and unforfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and after satisfying the fine, must refund the surplus, if any, to the defendant.

See People v. Laidlaw, 102 N. Y. 592.

ARTICLE VI.

SURRENDER OF THE DEFENDANT.

SECTION 590. Surrender, by whom, when and how made.

591. By whom, when and where defendant may be arrested for the purpose of a surrender.

592. On surrender before forfeiture, money deposited to be refunded; order therefor, how obtained.

§ 590. Surrender, by whom, when and how made.—At any time before the forfeiture of the undertaking, any surety may surrender the defendant in his exoneration, or the defendant may surrender himself, to the officer to whose custody he was committed, at the time of giving bail, in the following manner :

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon, as upon a commitment, and by a certificate in writing acknowledge the surrender ;

2. Upon the undertaking and the certificate of the officer, the court in which the indictment or the appeal, as the case may be, is pending, may, upon a notice of five days to the district attorney of the county, with a copy of the undertaking and certificate, order that the bail be exonerated ; and on filing the order and the papers used on the application, the bail is exonerated accordingly.

See *People v. Laidlaw*, 102 N. Y. 591.

§ 591. By whom, when and where, defendant may be arrested for the purpose of a surrender. — For the purpose of surrendering the defendant, any surety, at any time before he is finally charged, and at any place within the state, may himself arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 592. On surrender before forfeiture, money deposited to be refunded. — If money have been deposited instead of bail, and the defendant at any time before the forfeiture thereof surrender himself to the officer to whom the commitment was directed, in the manner provided in section five hundred and ninety, the court must order a return of the deposit to the defend-

ant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the district attorney, with a copy of the certificate.

See *People v. Laidlaw*, 103 N. Y. 591.

ARTICLE VII.

FORFEITURE OF THE UNDERTAKING OF BAIL, OR OF THE DEPOSIT OF MONEY.

SECTION 593. In what cases, and how ordered.

594. When and how forfeiture may be discharged.

595. Forfeiture of bail, to be enforced by action.

596. Deposit of money, when forfeited; how disposed of.

597. Remission of forfeiture.

598. Application therefor, how made and on what terms granted.

§ 593. In what cases, and how ordered. — If, without sufficient excuse, the defendant neglect to appear for arraignment, or for trial or judgment, or upon any other occasion where his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes; and the undertaking of his bail, or the money deposited, instead of bail, as the case may be, is thereupon forfeited.

Bastardy proceedings instituted against the defendant were adjourned from May 28 to June 7. On that day defendant appeared, and the hearing proceeded throughout the day, and were then adjourned by consent to June 26, on which day defendant failed to appear. At the time of the first adjournment a bond with two sureties was given which recited the proceedings and the adjournment to June 7. It was conditioned to be void if the said defendant should personally be and appear before the justices at the time and place aforesaid, and not depart therefrom without the leave of the justices. On the second adjournment, defendant and one of the sureties were present. It was stated by counsel for the two parties, in their presence, that the bond was to be held good. *Held*, that the sureties were not discharged from liability by the second adjournment. *People v. Millhau*, 100 N. Y. 273; 4 N. Y. Cr. Rep. 127. But see *People v. Swales*, 33 Hun, 208.

The court have no power to respite a recognizance to a succeeding term, against the express dissent of the bail. *People v. Clary*, 17 Wend. 374; *People v. Green*, 5 Hill, 647.

If a party, bound by a recognizance, be subsequently arrested on a bench

warrant, before a forfeiture, and escape, his bail are discharged. *People v. Stager*, 10 Wend. 481; *People v. Derby*, 1 Park. 392; *People v. Mack*, id. 567.

An arrest on a bench warrant after a forfeiture does not release the bail. *People v. Annable*, 7 Hill, 83.

A recognizance is forfeited, though the defendant appear, if he depart before the conclusion of the trial. *People v. McCoy*, 39 Barb. 73; *People v. Jane*, 27 id. 58.

It is no defense to an action on a recognizance for appearance that no indictment was found against the principal at such court. *Champlain v. People*, 2 N. Y. 82.

A party under recognizance to appear may be called upon on any day during the continuance of the court without notice. *People v. Blankman*, 17 Wend. 252.

If the defendant be called at any stage of the trial, and fail to appear and answer, his recognizance may be declared forfeited. *People v. Petry*, 2 Hilt. 523.

There is a breach of the recognizance if the defendant, though corporally present, do not answer when called. *People v. Wilgus*, 5 Den. 58.

It is a good defense to an action on a recognizance for a person's appearance to answer a criminal charge that he has been arrested and committed to jail in another county. *People v. Bartlett*, 3 Hill, 570; *People v. Haines*, 1 Den. 454.

It is a valid excuse for the non-appearance of the principal that he had enlisted as a soldier in the United States, etc. *People v. Chusney*, 44 Barb. 118; *People v. Cook*, 30 How. Pr. 110.

When a recognizance is conditioned for the appearance of the defendant on a day certain, and from time to time as directed by the justice, and the proceedings are adjourned at a time when the defendant is not present, there cannot be a forfeiture of the recognizance at a subsequent adjourned day. *People v. Scott*, 67 N. Y. 585.

§ 594. When and how forfeiture may be discharged. —
If, at any time before the final adjournment of the court, the defendant appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or deposit to be discharged, upon such terms as are just.

See *People v. Coman*, 5 Daly, 527; 49 How. Pr. 91.

§ 595. Forfeiture of bail, to be enforced by action. —
If the forfeiture be not discharged, as provided in the last section, the district attorney may, at any time after the adjournment of the court, proceed against any surety upon his undertaking. Such proceeding shall be by action only, except in the city and county of New York, where it shall be in the method now prescribed by special statute.

§ 596. **Deposit of money when forfeited, how disposed of.**— If, by reason of the neglect of the defendant to appear, as provided in section five hundred and ninety-three, money deposited instead of bail is forfeited, and the forfeiture be not discharged or remitted, as provided in sections five hundred and ninety-four and five hundred and ninety-seven, the county treasurer with whom it is deposited may, at any time after the final adjournment of the court, apply the money deposited to the use of the county.

§ 597. **Remission of forfeiture.**— After the forfeiture of the undertaking or deposit, as provided in this article, the court directing the forfeiture, the county court of the county, or in the city of New York, the court of common pleas of that city, may remit the forfeiture or any part thereof, upon such terms as are just.

See Code Civ. Proc., § 850; *People v. Spear*, 1 N. Y. Cr. Rep. 538.

A person having forfeited her bail by leaving the county, though afterward returning and giving bail under the indictment found against her since the forfeiture which is *nolle pro's'd*, is not entitled to the return of the money paid on the forfeiture of the bail. *People v. Fisher*, 8 State Rep. 382; 14 Daly, 278.

A judgment on a forfeited recognizance will not be discharged because of the illness of the surety at the time the recognizance was forfeited. *People v. Meehan*, 14 Daly, 333.

A judgment entered against surety and principal respectively, on a forfeited recognizance, will be canceled on motion, where it appears that subsequent to the forfeiture, the accused person appeared, was tried, and paid the fine imposed. *People v. Boesmecker* (Gen. Term, N. Y. Com. Pleas), 27 Week. Dig. 387.

A judgment entered on a forfeited recognizance taken in the special sessions in a prosecution for assault and battery will be vacated where it is shown that complainant appeared and acknowledged satisfaction for the injury and requested the discharge of defendant. *People v. Grossman* (Gen. Term, N. Y. Com. Pleas), 5 N. Y. Supp. 446.

To warrant the discharge of a judgment upon a forfeited recognizance, it must be shown to the court that the accused did not escape conviction through the absence of prosecutor and witness. *People v. Flegenheimer*, 15 State Rep. 876.

§ 598. **Application therefor, how made and on what terms granted.**— The application must be upon at least five days' notice to the district attorney of the county served with copies of the affidavits and papers on which it is founded, and can be granted only upon payment of the costs and expenses incurred in the proceedings for the enforcement of the forfeiture.

See *People v. Spear*, 1 N. Y. Cr. Rep. 538.

A statute providing that a defendant, instead of giving bail, may deposit with the county treasurer the sum mentioned in the order admitting him to bail, contemplates that the deposit is to be made by the defendant himself and by no one else. When the deposit is made by any party other than the defendant, it will be deemed to have been made for the defendant, and if conviction follows and a fine is imposed, the court may, under section 598, order the fine to be paid out of the money so deposited, and the balance, if any, paid to the defendant. *People, ex rel. Gilbert, v. Laidlaw*, 103 N. Y. 588.

ARTICLE VIII.

RE-COMMITMENT OF THE DEFENDANT, AFTER HAVING GIVEN BAIL, OR DEPOSITED MONEY INSTEAD OF BAIL.

SECTION 599. In what cases.

600. Contents of the order.

601. Defendant may be arrested in any county.

602. If for failure to appear for judgment, defendant must be committed.

603. If for other cause, he may be admitted to bail.

604. Bail in such case, by whom taken.

605. Form of the undertaking.

606. Qualifications of bail, and how put in.

§ 599. **In what cases.**—The court to which the committing magistrate returns the deposition and statement, or in which an indictment or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, or if the court be not in session, any judge thereof may direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time he was admitted to bail, and his detention until legally discharged, in the following cases.

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof, as provided in section five hundred and ninety-three;

2. When it satisfactorily appears to the court that his bail, or either of them, are dead, or insufficient, or have removed from the state;

3. Upon an indictment being found, in the cases provided in section three hundred and six.

See §§ 299, 300, 306, 475, 598, *ante*.

§ 600. Contents of the order.— The order for the recommitment of the defendant must recite, generally, the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal or policeman in this state, and committed to the officer to whose custody he was committed, at the time he was admitted to bail, to be detained until legally discharged.

§ 601. Defendant may be arrested in any county.—The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest; except, that when arrested in another county, the order need not be indorsed by a magistrate of that county.

§ 602. If for failure to appear for judgment, defendant must be committed.— If the order recite, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

§ 603. If for other cause, he may be admitted to bail.— If the order be made for any other cause, and the crime be bailable, the court may fix the amount of bail, and may direct in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

§ 604. Bail in such case, by whom taken.— When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority, in a similar case, to admit to bail upon the holding of the defendant to answer before indictment, as prescribed in sections five hundred and fifty-seven and five hundred and fifty-eight, or by any other magistrate to be designated by the court.

§ 605. Form of the undertaking.— When bail is taken upon the recommitment of the defendant, the undertaking of bail must be in substantially the following form:

“An order having been made on the day of eighteen hundred and , by the court of [naming the court], that A. B. be admitted to bail in the sum of dollars, in an action pending in that court against him in behalf of the

people of the state of New York, upon an [information, presentment, indictment or appeal, as the case may be].

"We, A. B., defendant, [if the defendant join in the undertaking], and C. D., surety of [stating his place of residence and occupation], and E. F., surety of [stating his place of residence and occupation], hereby, jointly and severally, undertake that the above-named A. B. shall appear in that or any other court in which his appearance may be lawfully required, upon that [information, presentment, indictment or appeal, as the case may be], and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of dollars" [inserting the sum in which the defendant is admitted to bail].

§ 606. **Qualifications of bail, and how put in.** — The bail must possess the qualifications, and must be put in, in all respects, in the manner prescribed by sections five hundred and sixty-nine to five hundred and seventy-seven, inclusive.

CHAPTER II.

COMPELLING THE ATTENDANCE OF WITNESSES.

SECTION 607. Subpoena defined.

608. Magistrate may issue subpoenas, on information or presentment.

609. District attorney may issue subpoenas for witnesses before grand jury.

610. He may also issue subpoenas for the people, on trial of an indictment.

611. Clerk may issue blank subpoenas for witnesses for defendant on trial.

612. Form of subpoena.

613. Requirement in subpoena, to produce books, papers and documents.

614. Subpoena, by whom served.

615. How served.

616. Payment of expenses of witness, when he is from without the county, or is poor.

617. Payment of expenses of witness, when he is from without the county, or is poor.

SECTION 618. Witnesses residing or served with subpoena out of the county, when and how compelled to attend.

619. Disobedience to subpoena, or refusal to be sworn or to testify how punished.

§ 607. Subpoena defined.—The process by which the attendance of a witness before a court or magistrate is required is a subpoena.

§ 608. Magistrate may issue subpoenas for witnesses before grand jury.—A magistrate, before whom an information is laid, may issue subpoenas, subscribed by him, for witnesses within the state, either on behalf of the people or of the defendant.

§ 609. District attorney may issue subpoenas for witnesses before grand jury.—The district attorney of the county may issue subpoenas, subscribed by him for witnesses within the state, in support of the prosecution or for such other witnesses as the grand jury may direct, to appear before the grand jury, upon an investigation pending before them.

§ 610. He may also issue subpoenas for the people, on trial of an indictment.—The district attorney may, in like manner, issue subpoenas subscribed by him, for witnesses within the state in support of an indictment, to appear before the court at which it is to be tried.

§ 611. Clerk may issue blank subpoenas for witnesses for defendant, on trial.—The clerk of the court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state, as may be required by the defendant.

Sherwin v. People, 100 N. Y. 351.

§ 612. Form of subpoena.—A subpoena, authorized by the last four sections, must be substantially in the following form:

“In the name of the people of the state of New York:

To A. B.

“You are commanded to appear before *O. D.*, a justice of the peace of the town of _____, [or “the grand jury of the county of _____,” or “the court of sessions of the county of _____,” or

as the case may be,] at [naming the place,] on [stating the day and hour,] as a witness in a criminal action prosecuted by the people of the state of New York, against E. F.

"Dated at the town of , [as the case may be,] the day of , 18 .

"G. H., justice of the peace," [or "I. K., district attorney," or "By order of the court, L. M., clerk," as the case may be].

§ 613. Requirement in subpoena, to produce books, papers and documents — If books, papers or documents be required, a direction to the following effect must be contained in the subpoena: "And you are required also to bring with you the following," [describing intelligibly the books, papers or documents required.]

§ 614. Subpoena, by whom served. — A peace officer must serve, in his county, city, town or village, as the case may be, any subpoena delivered to him for service, either on the part of the people or of the defendant; and must make a written return of the service, subscribed by him, stating the time and place of service, without delay. The subpoena may, however, be served by any other person.

§ 615. How served. — A subpoena is served by delivering it, or by showing it, and delivering a copy thereof, to the witness personally.

§ 616. Payment of expenses of witness, when he is from without the county, or is poor. — When a person attends before a magistrate, grand jury or court, as a witness on behalf of the people, upon a subpoena, or pursuant to an undertaking, and it appears that he has come from a place out of the county, or that he is poor, the court, if the attendance of the witness be upon a trial, by an order entered upon its minutes, or in any other case, the county judge, or in the city of New York the recorder or city judge, or judge of the general sessions of that city, by a written order, may direct the county treasurer to pay the witness a reasonable sum, to be specified in the order, for his expenses.

See §§ 394, 731.

§ 617. **Payment of expenses of witness, when he is from without the county, or is poor.** — Upon the production of the order, or a certified copy thereof, the county treasurer must pay the witness the sum specified therein, out of the county treasury.

§ 618. **Witnesses residing or served with subpoena, out of the county, when and how compelled to attend.** — No person is obliged to attend as a witness, before a court or magistrate out of the county where the witness resides or is served with the subpoena, unless the judge of the court in which the crime is triable, or a judge of the supreme court, or a county judge, or in the city of New York the recorder or city judge, or judge of the general sessions of that city, upon an affidavit of the prosecutor or district attorney, or of the defendant or his counsel, stating that he believes that the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness.

§ 619. **Disobedience to subpoena, or refusal to be sworn or to testify, how punished.** — Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate as for a criminal contempt, in the manner provided in the Code of Civil Procedure.

See Code Civ. Proc., §§ 8-18, 853; Penal Code, § 143, subd. 4, note; *People, ex rel. Sherwin, v. Mead*, 28 Hun, 227; 93 N. Y. 415; 3 N. Y. Cr. Rep. 524; *People, ex rel., v. Court of Oyer and Terminer*, id. 216; 36 Hun, 280; 101 N. Y. 251; 3 How. Pr. (N. S.) 418; 4 N. Y. Cr. Rep. 75; *People v. Sharp*, 45 Hun, 493.

CHAPTER III.

EXAMINATION OF WITNESSES, CONDITIONALLY.

SECTION 620. Witnesses to be examined conditionally for the defendant, as provided in this chapter.

621. In what cases defendant may apply for order.

622. Application, on what facts to be founded.

623. If during term, to be made to the court.

624. If not during term, to whom to be made.

625. The order, when granted and what to contain.

SECTION 626. If made by the court, may direct examination before a judge or magistrate; if made by a judge, examination to be before him.

627. On proof of service, if district attorney absent, examination to proceed.

628. If facts on which order was founded, be disproved, examination not to proceed.

629. Testimony, how taken and authenticated.

630. Deposition, how, by whom and when filed.

631. When it may be read in evidence.

632. When to be excluded.

633. On reading the deposition, on trial, what objections may be taken.

634. Attendance of witness for examination, how compelled.

635. Disobedience of witness, how punished.

§ 620. **Witnesses to be examined conditionally for the defendant, as provided in this chapter.**—When a defendant has been held to answer a charge of a crime, he may, either before or after indictment, have witnesses examined conditionally on his behalf, as prescribed in this chapter, and not otherwise.

See *People v. Sharp*, 45 Hun, 498; *People v. Guidici*, 100 N. Y. 503; 3 N. Y. Cr. Rep. 557; *People v. Squire*, 3 N. Y. State Rep. 194.

§ 621. **In what cases defendant may apply for order.**—When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

See *People v. Guidici*, 100 N. Y. 507.

Where it is certain or probable that the personal attendance of the witness cannot be had at the trial, his deposition should be taken. *Green v. Kent*, 7 Cow. 59; *Wait v. Whitney*, id. 69; *Ten Eyck v. Perkins*, 2 Wend. 308.

When a foreign witness is temporarily present he may be examined. *Wait v. Whitney*, 7 Cow. 69. Such examination may be taken at any stage of the case. *Packard v. Hill*, 7 Cow. 489; *Fort v. Ragusen*, 2 Johns. Ch. 246; *Rockwell v. Folsom*, 4 id. 165.

Held, also, that the evidence of a woman in an advanced state of pregnancy may be so taken. *Clark v. Dibble*, 16 Wend. 601.

Infirm witness may be so examined at any time after suit is brought. *Concklin v. Hart*, Col. & Caines, 74; 1 Johns. Cas. 108.

To entitle a deposition to be read the continued absence of the witness must be shown. *Fry v. Bennett*, 4 Duer, 247.

Evidence of such a witness may be taken during the trial. *Cole v. Cole*, 13 Hun, 373.

What evidence necessary to show continued absence of witness from state. *Bronner v. Frauenthal*, 87 N. Y. 166; 9 Bosw. 350.

A deposition may be read, though the witness returned after the examination, if he departed again before the trial. *Markoe v. Aldrich*, 1 Abb. Pr. 55.

§ 622. **Application, on what fact to be founded.**—The application must be made upon affidavit showing:

1. The nature of the crime charged;
2. The state of the proceedings in the action;
3. The name and residence of the witness, and that his testimony is material to the defense of the action; and,
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial.

See *People v. Guidici*, 100 N. Y. 507; 8 N. Y. Cr. Rep. 557.

The affidavit need not state the probable inability of the witness to attend the trial. *Ten Eyck v. Perkins*, 2 Wend. 808.

The application must show that it is made in good faith. *Paton v. Westerselt*, 5 How. 899.

Where it is probable or certain that a witness cannot attend the trial an application will be granted. *Green v. Kent*, 7 Cow. 59; *Wait v. Whitney*, id. 69; *Mumford v. Church*, 1 Johns. Cas. 147; *Concklin v. Hart*, Col. & Caines, 74.

It is a matter of right in a proper case when application is made in good faith. *Martin v. Hicks*, 6 Hun, 238; 1 Abb. N. C. 841; *Green v. Herder*, 7 Rob. 456.

An affidavit for such an order must show the subject on which the witness is to be examined, and the facts claimed to be within his knowledge. *Dauchy v. Miller*, 16 Abb. Pr. (N. S.) 100.

Must show facts and circumstances showing materiality of evidence desired. *Byrne v. Mulligan*, 41 N. Y. Super. 515.

A defect of the affidavit cannot be cured by examining the witness. *Henderson v. Fullerton*, 54 How. Pr. 422.

§ 623. **If during term, to be made to the court.**—The application, if made during the term, must be made to the court.

See *People v. Guidici*, 100 N. Y. 507.

§ 624. **If not during term, to whom to be made.**—If not made during the term, it may be made as follows:

1. When the indictment is pending in a court of oyer and terminer, or in a court of sessions other than in the city of New York, to a judge of the supreme court, or to the county judge;
2. When the indictment is pending in the court of general sessions of the city of New York, to the recorder or city judge

or judge of general sessions, or one of the judges of the court of common pleas of that city ;

3. When the indictment is pending in a city court, to the recorder or city judge of the city in which it is pending.

See *People v. Guidici*, 100 N. Y. 507; 3 N. Y. Cr. Rep. 557.

§ 625. The order, when granted and what to contain.

If the court or officer be satisfied, that the examination of the witness is necessary to the attainment of justice, an order must be made, that the witness be examined conditionally, at a specified time and place, and that a copy of the order, and of the affidavit on which it was granted, be served on the district attorney, within a specified time before that fixed for the examination.

See *People v. Guidici*, 100 N. Y. 507; 3 N. Y. Cr. Rep. 557.

§ 626. If made by the court, may direct examination before a judge or magistrate.— If the order be made by the court, it may direct that the examination be taken before a judge thereof, or before a magistrate in the county, to be named in the order. If made by any of the officers mentioned in section six hundred and twenty-four, it must direct the examination to be taken before him.

§ 627. On proof of service, if district attorney absent, examination to proceed.— On proof being furnished to the officer before whom the examination is appointed, of the service upon the district attorney, of a copy of the order, and of the affidavit on which it was granted, if no counsel appear on the part of the people, the examination must proceed.

See *People v. Guidici*, 100 N. Y. 507.

Service of notice may be proved by affidavit. *Ten Eyck v. Perkins*, 2 Wend. 308.

§ 628. If facts on which order was founded be disproved, examination not to proceed.— If the district attorney or other counsel appear on the part of the people, and it be shown to the satisfaction of the court or officer, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place ; otherwise it must proceed.

See *People v. Guidici*, 100 N. Y. 507.

§ 629. Testimony, how taken and authenticated. — The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information, as prescribed in section two hundred.

See § 200, *ante*, and cases cited; *People v. Guidici*, 100 N. Y. 507.

It is sufficient that the court certify that the deposition was read to the witness. *Sheldon v. Wood*, 2 Bosw. 267; 24 N. Y. 607.

The judge need not write down the examination himself. *McDonald v. Garrison*, 18 How. Pr. 249; 9 Abb. Pr. 34.

The certificate must state that the deposition was read to the witness and subscribed by him. *Foster v. Bullock*, 12 Hun, 200.

Defective depositions. *People v. Restell*, 3 Hill, 289; *People v. Ward*, 4 Park. 516; *People v. Chrystal*, 8 Barb. 545.

§ 630. Deposition, how, by whom and when filed. — The deposition must be retained by the officer taking it, and filed by him in the office of the clerk of the court without unnecessary delay.

See *People v. Guidici*, 100 N. Y. 507.

A deposition may be ordered filed *nunc pro tunc*. *Burdell v. Burdell*, 1 Duer, 625; 11 N. Y. Leg. Obs. 189; *Bank of Silver Creek v. Browning*, 16 Abb. Pr. 272.

§ 631. When it may be read in evidence. — The deposition, or a certified copy thereof, may be read in evidence by either party on trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state.

See *People v. Guidici*, 100 N. Y. 507; *Mut. Life Ins. Co. v. Anthony*, 50 Hun, 104.

The inability of witness must exist at the time of trial. *Fry v. Bennett*, 4 Duer, 247. See *Donnell v. Walsh*, 6 Bosw. 621.

It makes no difference that he returned to the state for a brief time after the examination was had. *Markoe v. Aldrich*, 1 Abb. Pr. 55.

What is sufficient proof of continued absence. *Bronner v. Frauenthal*, 37 N. Y. 166; *Markoe v. Aldrich*, 1 Abb. Pr. 55.

A defect in the form of the officer's certificate must be taken advantage of by a motion to suppress, if there be ample time before the trial. *Sheldon v. Wood* 2 Bosw. 267; 24 N. Y. 607.

§ 632. When to be excluded. — The deposition cannot, however, be read if it appear that the copy of the order and of the affidavit on which it was founded was not served on the

district attorney, as directed, or that the examination was in any respect unfair or not conducted as prescribed in this chapter.

See *People v. Guidici*, 100 N. Y. 507.

There must be an opportunity to cross-examine. *Hewlett v. Wood*, 67 N. Y. 894; 7 Hun, 297.

If consent be given to read deposition, it cannot be withdrawn. *Beebe v. People*, 5 Hill, 82.

If the opposite party attend and cross-examine, he cannot object to the sufficiency of the notice on the trial. *Elverson v. Vanderpoel*, 41 N. Y. Super. 257.

If the opportunity to cross-examine be lost through the fault or omission of the party in whose behalf the witness is examined, the deposition must be suppressed. *Hewlett v. Wood*, 67 N. Y. 894; 7 Hun, 227.

That the witness refused to answer a material question is no ground for rejecting the deposition at the trial in the absence of a previous motion to suppress. *Starin v. Atlantic Mut. Ins. Co.*, 68 N. Y. 77; 38 N. Y. Super. 281.

§ 633. On reading the deposition, on trial, what objections may be taken. — Upon the reading of the deposition in evidence, the same objections may be taken to a question or answer contained therein, as if the witness had been examined orally in court.

See *People v. Guidici*, 100 N. Y. 507.

§ 634. Attendance of witness for examination, how compelled. — The attendance of the witness may be enforced, by a subpoena subscribed by the officer, or issued under the seal of the court.

§ 635. Disobedience of witness, how punished. — Disobedience to the subpoena, or a refusal to be sworn or to testify, may be punished by the court or officer, as prescribed in section six hundred and nineteen.

See *People v. Guidici*, 100 N. Y. 507; 3 N. Y. Cr. Rep. 557; *People v. Sharp*, 45 Hun, 498; *People v. Court of Oyer and Terminer*, 101 N. Y. 251; 3 How. Pr. (N. S.) 418; 4 N. Y. Cr. Rep. 75.

CHAPTER IV.

EXAMINATION OF WITNESSES ON COMMISSION.

- SECTION 636.** Witness residing out of the state, to be examined for defendant, as provided in this chapter.
637. In what cases defendant may apply for order to examine witnesses on commission.
638. Commission, defined.
639. Application for commission, on what facts to be founded.
640. If during term, to be made to the court.
641. If not during term, to whom to be made.
642. Notice of application, when required and how given.
643. Order for commission, when granted.
644. Trial to be stayed until execution and return of commission.
645. Interrogatories, and notice of settlement.
646. Cross-interrogatories, and notice of settlement.
- 647, 648. What may be inserted in interrogatories.
649. Direction as to return of commission.
650. Commission, how executed.
651. Copy of last section to be annexed to commission.
- 652, 653. Commission, how returned, when delivered to agent for that purpose.
654. When and how filed.
655. Commission returned by mail, how disposed of.
656. Commission and return to be open for inspection, and copies to be furnished.
657. Deposition to be read in evidence ; what objections may be taken thereto.

§ 636. Witness residing out of the state, to be examined for defendant, as provided in this chapter. — When an issue of fact is joined upon an indictment, the defendant may have any material witness residing out of the state, examined in his behalf, as prescribed in this chapter, and not otherwise.

The testimony of a witness residing out of the state cannot be taken on commission to be read before commissioners appointed to examine and report on the sanity of a defendant. *People v. Haight*, 13 Abb. N. C. 197; 3 N. Y. Cr. Rep. 61.

The statute (Code Crim. Pro., §§ 636–657) only authorize a commission to take testimony to be read on the trial of an indictment. *People v. Haight*, 13 Abb. N. C. 197; 3 N. Y. Cr. Rep. 61.

§ 637. In what cases defendant may apply for order to examine witnesses on commission. — When a material witness for the defendant resides out of the state, the defendant may apply for an order that the witness be examined on a commission.

The power to issue a commission is an innovation of the common law, and must be strictly pursued. *Dwinelle v. Howland*, 1 Abb. Pr. 87; *Creamer v. Jackson*, 4 id. 418.

The right to a commission depends solely upon the statute. *McCall v. Sun Mut. Ins. Co.*, 50 N. Y. 332; 44 How. Pr. 452.

New commissions for examination of same witness may issue. *Fisher v. Dale*, 17 Johns. 343; *Ranney v. Weed*, 1 Barb. 220. Or may be ordered executed. *Baker v. Spencer*, 47 N. Y. 562.

A commission will not be granted after the commencement of a trial before a referee where the party has been guilty of laches. *Rathbun v. Ingersoll*, 84 N. Y. Super. 211.

A commission will not be granted for the examination of the plaintiff in his own behalf whilst he is a fugitive from justice residing in a foreign country. *McMonagle v. Conkey*, 14 Hun, 326.

§ 638. Commission defined. — A commission is a process issued under the seal of the court and the signature of the clerk, directed to one or more persons, designated as commissioners, authorizing them to examine the witness upon oath, on interrogatories annexed thereto, and to take and return the deposition of the witness, according to the directions given with the commission.

§ 639. Application for commission, on what facts to be founded. — The application must be made upon affidavit, showing:

1. The nature of the crime charged;
2. The state of the proceedings in the action, and that issue of fact has been joined therein;
3. The name of the witness, and that his testimony is material to the defense of the action;
4. That the witness resides out of the state.

Need not state what proof is expected. *Eaton v. North*, 7 Barb. 631.

Affidavit may be made by agent or attorney. Id.

The witnesses must be named in the commission, if by reasonable diligence their names can be ascertained. *Wright v. Jessup*, 3 Duer, 642.

The court in a special case may grant a commission where the names of the witnesses are not stated. *McMahon v. Allen*, 18 Abb. Pr. 292.

The application must state particular circumstances. *Hackley v. Patrick*, 2 Johns. 478; *Allen v. Hendre*, 6 Cow. 400.

An affidavit for a commission is sufficient if it show the witness to be material, as he is advised, and is out of the jurisdiction. *Brackett v. Dudley*, 1 Cow. 209.

The affidavit may be made by the attorney. *Murray v. Kirkpatrick*, 1 Cow. 210; *Corbett v. DeComeau*, 54 How. Pr. 506.

Or by a third party. *Demar v. Van Zant*, 2 Johns. Cas. 69.

Must be on notice. *Watson v. Delafield*, Col. & Caines, 407; 2 Caines, 260.

Affidavit must state positively the nature of the crime charged. See *Tillon v. U. S. L. Ins. Co.*, 52 How. Pr. 179; 1 Abb. N. C. 348; *Borman v. Pierce*, 56 How. Pr. 251; *Elmore v. Hyde*, 3 Abb. N. C. 129; *Beach v. New York*, 14 Hun, 79; *Webster v. Stockwell*, 3 Abb. N. C. 115.

§ 640. **If during term, to be made to the court.** — The application, if made during the term, must be made to the court.

§ 641. **If not during term, to whom to be made.** — If not made during the term, the application may be made as follows:

1. When the indictment is pending in a court of oyer and terminer, or in a court of sessions, except in the city and county of New York, to a judge of the supreme court or to the county judge;

2. When the indictment is pending in the court of general sessions in the city and county of New York, to the recorder or city judge or judge of general sessions, or one of the judges of the court of common pleas of that city;

3. When the indictment is pending in a city court, to the recorder or judge of the court in which it is pending.

§ 642. **Notice of application, when required and how given.** — If the application be made to the court, it may be without notice to the district attorney, unless the court direct notice to be given, in which case it must prescribe the manner of giving the same. If made to one of the officers mentioned in the last section, the application must be upon five days' notice to the district attorney served, with a copy of the affidavit upon which it is founded.

Ordinarily it must be on notice. *Watson v. Delafield*, Col. & Caines, 407; 2 Caines, 260.

§ 643. **Order for commission, when granted.** — If the court or officer to whom the application is made be satisfied that the witness resides out of the state, and that his examination is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and that the people be permitted to join in the commission, and to examine witnesses in support of the indictment.

The order for the commission must name the commissioners. *Harris v. Wilson*, 2 Wend. 627; *Townsend v. N. Y. Ins. Co.*, 1 Caines, 4.

Who may act as such. *Lewis v. Van Loon*, 3 Caines, 105.

The counsel for the respective parties may waive the requirement that a commission must be under seal of the court. *Churchill v. Carter*, 15 Hun, 885.

The clerk's signature not essential. *Goodyear v. Vosburgh*, 41 How. Pr. 421.

Nor seal. *Tracy v. Suydam*, 30 Barb. 110; *Whitney v. Wyncoop*, 4 Abb. Pr. 870.

§ 644. Trial to be stayed until execution and return of commission.—If the application for a commission be granted, the court or judge must insert in the order therefor, a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

When stay will be vacated. *Voss v. Fielden*, 2 Sandf. 690.

§ 645. Interrogatories, and notice of settlement.—When the commission is ordered, the defendant must serve upon the district attorney, and the district attorney, if he intend to join in the commission and examine witnesses in support of the indictment, must serve upon the defendant or his counsel, a copy of the interrogatories to be annexed thereto, with a notice of two days of their settlement, before an officer who might have granted the order out of term, as provided in section six hundred and forty-one.

The direction of the manner of returning the interrogatories must be signed by the officer settling the interrogatories. *Crawford v. Loper*, 25 Barb. 449.

On settling the interrogatories the judge should allow only such as are pertinent to the issue. *McDonald v. Garrison*, 2 Hilt. 510; 9 Abb. Pr. 178; *Blaesdell v. Raymond*, id. 178, n.

An indorsement on the commission of the allowance of the interrogatories is sufficient, if it refer to them as annexed. *Halleran v. Field*, 23 Wend. 38.

It is enough that the interrogatories be signed by counsel. *Horner v. Martin*, 6 Cow. 156.

§ 646. Cross-interrogatories, and notice of settlement.—The district attorney, and the defendant, may, in the same manner, serve cross-interrogatories, to be annexed to the commission, with the like notice of the settlement thereof.

§ 647. What may be inserted in interrogatories.—In the interrogatories, either party may insert any question pertinent to the issue.

On settling the interrogatories it is the duty of the judge to allow only such as are pertinent. *McDonald v. Garrison*, 2 Hilt. 510; 9 Abb. Pr. 178; *Blaesdell v. Raymond*, id. 178, n.

§ 648. **What may be inserted in interrogatories.** — Upon the settlement of the interrogatories, the judge must expunge every question not pertinent to the issue, and modify the questions, so as to conform them to the rules of evidence, and when settled, must indorse upon them his allowance, and annex them to the commission.

§ 649. **Direction as to return of commission.** — Unless the parties otherwise consent, by an indorsement upon the commission, the officer must indorse thereon a direction, as to the manner in which it must be returned; and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the indictment is pending, designating his name and the place where his office is kept.

Unless returned as directed, it cannot be read. *Richardson v. Gere*, 21 Wend. 156.

It is sufficient if the return be directed in the mode stipulated by the parties. *Williams v. Eldridge*, 1 Hilt. 249.

A commission not vitiated by being returned to the clerk of the original county after the place of trial has been changed. *Whitney v. Wyncoop*, 4 Abb. 370.

No objection that it was delivered to an attorney at the post-office and by him conveyed to the county clerk's office. *Horner v. Martin*, 6 Cow. 156. See *Halleran v. Field*, 23 Wend. 88.

The commissioners need not indorse on the envelope that they deposited the same in the post-office. *Brunskill v. James*, 11 N. Y. 294; *Hall v. Barton*, 25 Barb. 274.

§ 650. **Commission, how executed.** — The commissioners, or any one of them, unless otherwise specially directed, may execute the commission as follows:

1. They must publicly administer an oath to the witness, that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth;

2. They must cause the examination of the witness to be reduced to writing;

3. They must write the answers of the witness, as nearly as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it, until it is made conformable to what he declares the truth;

4. If the witness decline answering a question, that fact, with the reason for which he declines answering it, as he gives it, must be stated ;

5. If papers or documents are produced before them, and proved by the witness, they must be annexed to his deposition, and be subscribed by the witness and certified by the commissioners ;

6. The commissioners must subscribe their names to each sheet of the deposition, and annex the deposition, with the papers or documents proved by the witness, to the commission, and must close it up under seal and address it, as directed thereon ;

7. If there be a direction on the commission, to return it by mail, the commissioners must immediately deposit it in the nearest post-office. If any other direction be made, by the written consent of the parties, or by the officer, on the commission, as to its return, they must comply with the direction.

One commissioner may, in certain cases, execute. *Leech v. A. M. Ins. Co.*, 4 Daly, 518.

Commissioners must certify that witnesses were examined under oath. *Bailes v. Cochran*, 2 Johns. 417; *Whitney v. Wyncoop*, 4 Abb. Pr. 370.

Witnesses may be sworn by the local authorities if the law of the place forbid the commissioners from administering oath. *Lincoln v. Battelle*, 6 Wend. 475.

Oath should be publicly administered. *Halleran v. Field*, 23 Wend. 386.

The jurat must be signed by the commissioners, with their names of office. *Root v. Stiles*, Col. & Caines, 468; 8 Caines, 128.

An interpreter may be employed when necessary. *Leech v. A. M. Ins. Co.*, 4 Daly, 518.

Witness must answer each question specifically. *Union Bank v. Torrey*, 5 Duer, 626; 2 Abb. Pr. 269; *Percival v. Hickey*, 18 Johns. 257.

Witness may state any fact material, though detrimental to the party interrogating. *Van Ness v. Bush*, 14 Abb. Pr. 33.

Where a cross-interrogatory is not properly answered, the deposition cannot be read unless the defect is waived. *Kimball v. Davis*, 19 Wend. 437.

Parties have a right to appear by counsel. *Union Bank v. Torrey*, 5 Duer, 626; 2 Abb. Pr. 269.

Witness not allowed to read his answer from a paper before prepared. *Creamer v. Jackson*, 4 Abb. Pr. 413; *Commercial Bank v. Union Bank*, 11 N. Y. 203; 19 Barb. 391.

As to paper introduced as an exhibit. *Howard v. O. M. Ins. Co.*, 9 Bosw. 645; *Brunskill v. James*, 11 N. Y. 294.

The court may send back for correction a defective commission. *Keeler v. Vanderpoel*, 1 Code R. (N. S.) 289.

A motion to suppress or send back for correction cannot be made at the trial. *Gates v. Beecher*, 3 Th. & C. 404.

An answer, though not full, is sufficient if not clearly evasive. *Baker v. Spencer*, 47 N. Y. 562; *Terry v. McNeil*, 58 Barb. 241.

Where there are two persons of the same name of the commissioner selected, an objection that it was not executed by the proper person cannot be raised for the first time at the trial. *Newton v. Porter*, 69 N. Y. 133.

If the commissioner return that the witness was sworn, it will be presumed that he was legally sworn. *Bishop v. Ferguson*, 46 N. Y. 683.

§ 651. Copy of last section to be annexed to commission.
A copy of the last section must be annexed to the commission.

§ 652. Commission, how returned, when delivered to agent for that purpose. — If the commission and return be delivered by the commissioners to an agent, he must deliver it to the clerk to whom it is directed, or to a judge of the court in which the indictment is pending, by whom it may be received and opened, upon the affidavit of the agent that he received it from the hands of one of the commissioners, and that it has not been opened or altered since he received it.

In such a case the agent's affidavit is indispensable. *Dwinelle v. Howland*, 1 Abb. Pr. 87.

No objection to the return of a commission that it was delivered at the post-office to the attorney of one of the parties, who conveyed it to the clerk's office, there being no suspicion of abuse. *Horner v. Martin*, 6 Cow. 156.

§ 653. Commission, how returned, when delivered to agent for that purpose. — If the agent be dead, or from sickness or other casualty, unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty, unable to deliver it, that it has not been opened or altered since the person making the affidavit received it, and that he believes it has not been opened or altered since it came from the hands of the commissioners.

§ 654. When and how filed. — The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending.

A deposition cannot be read in evidence until actually filed in the clerk's office. *Parker v. Holby*, 20 Johns. 357; *Oncida Mfg. Society v. Lawrence*, 4 Cow. 440.

§ 655. Commission returned by mail, how disposed of. If the commission and return be transmitted by mail, the clerk to whom it is addressed must open and file it in his office, where it must remain, unless the court otherwise direct.

A commission returned by mail addressed to the clerk cannot be read, unless an order were made for its return in that manner. *Richardson v. Gere*, 21 Wend. 156.

It is no objection that they were not deposited in the post-office immediately after they were taken. *Halleran v. Field*, 23 Wend. 38.

The commissioners need not indorse on the envelope a certificate that they deposited the return in the post-office. *Brunskill v. James*, 11 N. Y. 294; *Hall v. Barton*, 25 Barb. 274.

A deposition cannot be read until actually filed. *Parker v. Holby*, 20 Johns. 357; *Oneida, etc. v. Lawrence*, 4 Cow. 440.

§ 656. Commission and return to be opened for inspection, and copies to be furnished.—The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same, or of any part thereof, on payment of his fees, at the rate of five cents for every hundred words.

See Code Civ. Proc., § 961.

§ 657. Deposition to be read in evidence; what objections may be taken thereto.—The deposition, taken under the commission, may be read in evidence by either party on the trial, and the same objections may be taken to a question in the interrogatories, or to an answer in the deposition, as if the witness had been examined orally in court.

Mere formal defects which are wholly immaterial may be disregarded. *Rust v. Eckler*, 41 N. Y. 488.

Where the statute has been substantially complied with, and the prisoner is not prejudiced, it is sufficient. *Goodyear v. Vosburgh*, 41 How. Pr. 421; *Hall v. Barton*, 25 Barb. 274; *McCleary v. Edwards*, 27 id. 289.

The absence of the return which the statute requires to be indorsed on the commission is not a ground for suppressing the deposition on motion. *Creamer v. Jackson*, 4 Abb. Pr. 413.

A commission issued without a seal is a nullity, and the depositions taken under it cannot be read in evidence. *Ford v. Williams*, 24 N. Y. 359.

Nor until filed in the clerk's office. *Parker v. Holby*, 20 Johns. 357; *Oneida Mfg. Society v. Lawrence*, 4 Cow. 440.

The deposition may be read by either party. *Weber v. Kingsland*, 8 Bosw. 415.

The informal party may be excluded. *Commercial Bank v. Union Bank*, 11 N. Y. 203.

Objections taken must point out the error complained of. *Dalton v. National Society, etc.*, 20 N. Y. 32.

When answers will be excluded. *Lansing v. Cooley*, 13 Abb. Pr. 272; *Railway, etc., v. Warner*, 1 Th. & C. 21; *Fassin v. Hubbard*, 55 N. Y. 465; *Heineman v. Hurd*, 2 Hun, 324; *Meyer v. Levy*, 54 How. Pr. 274.

An objection to the interrogatories cannot be made on the trial. *Frances v. Ocean Ins. Co.*, 6 Cow. 404; 2 Wend. 64; *Hall v. Barton*, 25 Barb. 274.

If the witness refuse to answer a cross-interrogatory the whole deposition may be rejected. *Smith v. Griffith*, 3 Hill, 333.

An objection that some of the interrogatories are not fully answered must be made as soon as discovered, on a motion to suppress. *Vilmar v. Schall*, 85 N. Y. Super. 67; 61 N. Y. 688.

The inadmissibility of evidence is the proper ground for such a motion. *Howard v. Orient M. Ins. Co.*, 9 Bosw. 645.

A deposition will not be suppressed because an answer to a cross-interrogatory is not full. *Baker v. Spencer*, 47 N. Y. 562.

An answer not responsive may be excluded on objection. *Lansing v. Cooley*, 13 Abb. Pr. 272.

An answer not responsive will be excluded. *Railway Pass. Ass. Co. v. Warner*, 1 Th. & C. 21, add.

Testimony otherwise competent not to be rejected. *Fassin v. Hubbard*, 55 N. Y. 465.

If the answer of a witness to a direct interrogatory be properly excluded, all cross-interrogatories must also be, if dependent thereon. *Fleming v. Holtenback*, 7 Barb. 271.

The deposition will be stricken out on the trial if evasive or untruthful, or if the witness has not fully and fairly answered the cross-interrogatories. *Terry v. McNeil*, 58 Barb. 241.

An objection to a question as leading must be made on settlement of the interrogatories, or it is waived. *Haslewood v. Heminway*, 3 Th. & C. 787.

A party who has taken the testimony of a witness residing abroad, under a commission, may read the deposition, though the witness be in court; he is not bound to call the witness, but he may be called and examined by the other side. *Phenix v. Baldwin*, 14 Wend. 62.

The original commission must be used when the cause is tried in the county to which it is returned. In another county an authenticated copy may be used. *Bishop v. Ferguson*, 46 N. Y. 688.

The party who took the commission may read the answers to the cross-interrogatories, though the other party object. *Marshal v. Watertown S. E. Co.*, 10 Hun, 468.

Where the question is leading, and the answer is the expression of the judgment of the witness upon the fact, it is not legal evidence and cannot be disregarded as harmless on motion for new trial. *Meyer v. Levy*, 54 How. Pr. 274.

The mere fact that the witness was permitted to peruse both sets of interrogatories, prior to his examination, not sufficient ground for the rejection of the evidence. *Butler v. Flanders*, 56 How. Pr. 312.

The court has discretionary power upon objections. *Cope v. Sibbey*, 12 Barb. 521; *Haslewood v. Heminway*, 3 Th. & C. 787.

Where there were two persons by the name of the commissioner selected, an objection that it was not executed by the proper person cannot be raised for the first time at the trial. *Newton v. Porter*, 69 N. Y. 183.

CHAPTER V.

INQUIRY INTO THE INSANITY OF THE DEFENDANT BEFORE OR DURING
THE TRIAL, OR AFTER CONVICTION.

SECTION 658. Appointment of commission; their proceedings.

659. If found insane, trial or judgment suspended, and defendant to be committed to state lunatic asylum, if his discharge be dangerous to the public peace or safety.

660. If defendant committed, bail exonerated or deposit of money refunded.

661. Detention of defendant in asylum, and proceedings on his becoming sane.

662. Expenses incident to sending defendant to asylum, how paid.

§ 658. **Appointment of commission ; their proceedings.**
When a defendant pleads insanity, as prescribed in section three hundred and thirty-six, the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons to examine him and report to the court as to his sanity at the time of the commission of the crime.

If a defendant in confinement, under indictment, appears to be, at any time before or after conviction, insane, the court in which the indictment is pending, unless the defendant is under sentence of death, may appoint a like commission to examine him and report to the court as to his sanity at the time of the examination.

The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the Code of Civil Procedure to be taken by referees. They must be attended by the district attorney of the county, and may call and examine witnesses and compel their attendance. The counsel of the defendant may take part in the proceedings. When the commissioners have concluded their examination they must forthwith report the facts to the court with their opinion thereon.

Commissioner's oath. Code Civ. Proc., § 1016.

See Penal Code, § 20; 2 Crim. Law Mag. 605, 612; *People v. Haight*, 13 Abb. N. C. 198; 3 N. Y. Cr. Rep. 61; *People v. Rhineland*, 2 id. 388; *People, ex rel., v. Walsh*, 21 Abb. N. C. 299; *People v. McElvaine*, 125 N. Y. 596.

§ 659. If found insane, trial or judgment suspended, and defendant to be committed to state lunatic asylum, if his discharge be dangerous to the public peace or safety. — If the commission find the defendant insane, the trial of judgment must be suspended until he becomes sane; and the court, if it deem his discharge dangerous to the public peace or safety, must order that he be, in the meantime, committed by the sheriff to a state lunatic asylum; and that upon his becoming sane, he be re-delivered by the superintendent of the asylum to the sheriff.

§ 660. If defendant committed, bail exonerated or deposit of money refunded. — The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail.

§ 661. Detention of defendant in asylum, and proceedings on his becoming sane. — If the defendant be received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give a written notice of that fact to a judge of the supreme court of the district in which the asylum is situated. The judge must require the sheriff without delay to bring the defendant from the asylum and place him in the proper custody until he be brought to trial, judgment, or execution as the case may be, or be legally discharged.

§ 662. Expenses incident to sending defendant to asylum, how paid. — The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are, in the first instance, chargeable to the county from which he was sent; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county, bound to provide for and maintain him elsewhere.

CHAPTER VI.

COMPROMISING CERTAIN CRIMES, BY LEAVE OF THE COURT.

SECTION 663. Certain crimes, for which the party injured has a civil action, may be compromised.

664. Compromise to be by permission of the court; order thereon.

665. Order, a bar to another prosecution.

666. No public offense to be compromised, except as provided in this chapter.

§ 663. Certain crimes for which the party injured has a civil action, may be compromised.— When a defendant is brought before a magistrate or is held to answer, on a charge of a misdemeanor, for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in the next section, except when it was committed,

1. By or upon an officer of justice, while in the execution of the duties of his office;
2. Riotously; or
3. With an intent to commit a felony.

§ 664. Compromise to be by permission of the court; order thereon.— If a party injured appear before the magistrate, or before the court to which the deposition and statements are required, by section two hundred and twenty-one, to be returned at any time before trial or commitment by the magistrate, or trial on indictment for the crime, and acknowledge in writing that he has received satisfaction for the injury, the magistrate or court may, in his or its discretion, on payment of the costs and expenses incurred, if such magistrate or court shall see fit so to direct, order all proceedings to be stayed upon the prosecution and the defendant be discharged therefrom. But in that case, the reason for the order must be set forth therein and entered upon the minutes.

§ 665. Order a bar to another prosecution.— The order authorized by the last section is a bar to another prosecution for the same offense.

§ 666. No public offense to be compromised, except as provided in this chapter. — No crime can be compromised, nor can any proceeding for the prosecution or punishment thereof upon a compromise be stayed, except as provided in sections six hundred and sixty-three and six hundred and sixty-four.

See Penal Code, § 125, notes.

CHAPTER VII.

DISMISSAL OF THE ACTION, BEFORE OR AFTER INDICTMENT, FOR WANT OF PROSECUTION OR OTHERWISE.

SECTION 667. Dismissal, when a person held to answer is not indicted at the next term thereafter.

668. When a person indicted is not brought to trial at the next term thereafter.

669. Court may order action to be continued, and in the meantime discharge defendant from custody, on his own undertaking, or on bail.

670. If action dismissed, defendant to be discharged from custody, or his bail exonerated, or deposit of money refunded.

671. Court may order indictment to be dismissed.

672. *Nolle prosequi* abolished; no indictment to be dismissed or abandoned, except according to this chapter.

673. Dismissal, a bar, in misdemeanor, but not in felony.

§ 667. Dismissal, when a person held to answer is not indicted at the next term thereafter. — When a person has been held to answer for a crime, if an indictment be not found against him, at the next term of the court at which he is held to answer, the court may, on application of the defendant, order the prosecution to be dismissed, unless good cause to the contrary be shown.

§ 668. When a person indicted is not brought to trial at the next term thereafter. — If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

See *People v. Beckwith*, 2 N. Y. Cr. Rep. 31. See 11 Eng. Rep. 383.

§ 669. Court may order action to be continued, and in the meantime discharge defendant from custody, on his own undertaking, or on bail. — If the defendant be not indicted or tried, as provided in the last two sections, and sufficient reason therefor be shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody, on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

See *People v. Beckwith*, 2 N. Y. Cr. Rep. 81.

§ 670. If action dismissed, defendant to be discharged from custody, or his bail exonerated, or deposit of money refunded. — If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

See *People v. Beckwith*, 2 N. Y. Cr. Rep. 81.

§ 671. Court may order indictment to be dismissed. — The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed.

See *People v. Beckwith*, 2 N. Y. Cr. Rep. 29.

§ 672. Nolle prosequi abolished; no indictment to be dismissed or abandoned except according to this chapter. — The entry of a *nolle prosequi* is abolished; and neither the attorney-general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in the last section.

§ 673. Dismissal, a bar in misdemeanor, but not in felony. — An order for the dismissal of the action, as provided in this chapter, is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar, if the offense charged be a felony.

See § 9, ante, and cases cited; Rapalje's Crim. Proc., § 129.

CHAPTER VIII.

REMITTING THE PUNISHMENT IN CERTAIN CASES.

SECTION 674. Punishment, upon conviction of a master of a vessel from a foreign country.

§ 674. Punishment, upon conviction of a master of a vessel from a foreign country. — When the master of a vessel arriving from a foreign country is convicted of having knowingly brought a person convicted therein of a crime, which, if committed in this state, would be a felony, to a place within the state, the court before which the conviction is had may, if satisfied that the defendant has reconveyed the convict to the place from which he took him, and on payment of the costs of prosecution, order the punishment upon the conviction to be remitted.

CHAPTER IX.

PROCEEDINGS AGAINST CORPORATIONS.

SECTION 675. Summons upon an information or presentment against a corporation, by whom issued, and when returnable.

676 Form of the summons.

677. When and how served.

678. Examination of the charge.

679. Certificate of the magistrate, and return thereof with the depositions.

680. Grand jury may proceed as in the case of a natural person.

681. Appearance, and plea to indictment, and proceedings thereon.

682. Fine, on conviction, how collected.

§ 675. Summons upon an information or presentment against a corporation, by whom issued, and when returnable. — Upon an information against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge; the time to be not less than ten days after the issuing of the summons.

§ 676. **Form of the summons.**—The summons must be in substantially the following form:

"County of *Albany*, [or as the case may be.]

"In the name of the people of the state of New York:

"To the [naming the corporation.]

"You are hereby summoned to appear before me, at [naming the place,] on [specifying the day and hour,] to answer a charge made against you, upon the information of *A. B.*, for [designating the offense, generally.]

"Dated at the city, [or 'town,'] of _____, the _____ day of _____, 18 _____.

"G. H., *Justice of the peace.*"

[Or as the case may be.]

§ 677. **When and how served.**—The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president, or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

§ 678. **Examination of the charge.**—At the time appointed in the summons, the magistrate must proceed to investigate the charge, in the same manner as in the case of a natural person brought before him, so far as those proceedings are applicable.

§ 679. **Certificate of the magistrate, and return thereof with the depositions.**—After hearing the proofs, the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the depositions and certificate, in the manner prescribed in section two hundred and twenty-one.

§ 680. **Grand jury may proceed as in the case of a natural person.**—If the magistrate return a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon, as in the case of a natural person held to answer.

See *People v. Equitable Gas-light Co.*, 6 N. Y. Cr. Rep. 193.

§ 681. **Appearance, and plea to indictment, and proceedings thereon.**—When an indictment is filed against any corporation, such corporation must be arraigned thereon, and the court acquires jurisdiction over the corporation, in the manner following:

1. The clerk of the court wherein such indictment is found, or to which it is sent or removed, or the district attorney of the county, must issue a summons signed by him with his name of office, requiring such corporation to appear and answer the indictment by a demurrer or written plea to be verified in like manner as a pleading in a civil action, at a time and place to be specified in such summons, such time to be not less than five days after the issue thereof. The summons may be substantially in the following form:

Court of oyer and terminer of the county of _____, (state the proper county or court as the case may be)

The People of the State of New York

vs.

The A. B. Company.

! You are hereby summoned to appear in this court and, by demurrer or plea in writing duly verified, answer an indictment filed against you by the grand jury of this county, on the _____ day of _____, charging you with the

crime of (designating the offense generally), at a term of the court of oyer and terminer (or as the cause may be) of this county, at (naming the place) on (stating the day and hour) and in case of your failure to so appear and answer, judgment will be pronounced against you.

Dated at the city (or town) of _____, the _____ day of _____, 18 ____.

C. D.,

District Attorney.

(or by order of the court, E. F., Clerk, as the case may be).

2. The summons must be served at least four days before the appearance fixed therein, in the same manner as is provided for the service of a summons upon a corporation in a civil action; and if the corporation does not appear in the manner and at the time and place specified in the summons, judgment must be pronounced against it.

3. Nothing contained in this section shall be construed as preventing the appearance of a corporation by counsel to answer an indictment, without the issuance or service of the summons as above provided. And when an indictment shall have been filed against a corporation it may voluntarily appear and answer the same by counsel duly authorized to so appear for it; in which case the court acquires full jurisdiction over the corporation in the same manner as if the summons had been issued and served. [*Amended 1892, ch. 219; in effect Sept. 1, 1892.*]

See *People v. Equitable Gas-light Co.*, 3 N. Y. Cr. Rep. 193.

§ 682. **Fine, on conviction, how collected.**—When a fine is imposed upon a corporation upon conviction, it may be collected in the same manner as a judgment in a civil action, and if an execution issued upon such judgment be returned unsatisfied, the district attorney of the county may thereupon bring an action in the name of the people of the state of New York, to procure a judgment sequestrating the property of the corporation, as provided by the Code of Civil Procedure. [*Amended 1892, ch. 219; in effect Sept. 1, 1892.*]

CHAPTER X.

ENTITLING AFFIDAVITS.

SECTION 683. Affidavits defectively entitled, valid.

§ 683. **Affidavits defectively entitled, valid.**—It is not necessary to entitle an affidavit or deposition, in the action, whether taken before or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose, as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or appeal in which it is made.

CHAPTER XI.

ERRORS AND MISTAKES IN PLEADINGS AND OTHER PROCEEDINGS.

SECTION 684. Errors, etc., when not material.

§ 684. **Errors, etc., when not material.**—Neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor an error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right.

See § 285, *ante*; *People v. Willett*, 27 Hun, 469, 471; *People v. Menken*, 8 N. Y. Cr. Rep. 238; 36 Hun, 95; *Schrumpf v. People*, 14 id. 13; *People v. Holmes*, 41 id. 55; 5 N. Y. Cr. Rep. 181; *People v. Courtney*, 1 id. 557; *Tillotson v. Martin*, 40 Hun, 322; *People v. Williams*, 18 N. Y. State Rep. 405; *People, ex rel., v. Smith*, 11 Civ. Proc. Rep. 186; *People v. Dimick*, 107 N. Y. 13, 34; *People v. Gillman*, 125 id. 372; *People v. Hagan*, 87 State Rep. 661.

CHAPTER XII.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

SECTION 685. When property, alleged to be stolen or embezzled, comes into custody of peace officer.

686. Order for its delivery to owner.

687. When it comes into custody of magistrate, he must deliver it to owner, on proof of title and payment of expenses.

688. Court in which trial is had for stealing or embezzling it, may order it to be delivered to owner.

689. If not claimed in six months, to be delivered to county superintendent of the poor, or in New York, to commissioners of charities and corrections.

690. Receipt for money or property taken from a person arrested for a public offense.

691. Duties of police clerks in the city of New York, etc.

§ 685. When property, alleged to be stolen or embezzled, comes into custody of peace officer.—When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it, subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

See *Simpson v. St. John*, 93 N. Y. 363.

§ 686. **Order for its delivery to owner.**—On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner, unless its temporary retention be deemed necessary in furtherance of justice, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

See *Simpson v. St. John*, 93 N. Y. 363; *Houghton v. Backman*, 47 Barb. 398

§ 687. When it comes into custody of magistrate, he must deliver it to owner on proof of title and payment of expenses. — If property stolen or embezzled come into the custody of a magistrate, it must, unless its temporary retention be deemed necessary in furtherance of justice, be delivered to the owner, on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

' See *Simpson v. St. John*, 98 N. Y. 363; *Houghton v. Backman*, 47 Barb. 392.

§ 688. Court in which trial is had for stealing or embezzling it, may order it to be delivered to owner. — If property stolen or embezzled have not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner.

§ 689. If not claimed in six months, to be delivered to county superintendent of the poor, or, in New York, to commissioners of charities and corrections. — If property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in his custody must, on payment of the necessary expenses incurred in its preservation, deliver it to the county superintendents of the poor, or, in the city of New York, to the commissioners of charities and corrections, to be applied for the benefit of the poor of the county or city, as the case may be.

§ 690. Receipt for money or property taken from a person arrested for a public offense. — Except in the city of New York, when money or other property is taken from a defendant, arrested upon a charge of a crime, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and the other of which he must forthwith file with the clerk of the court to which the depositions and statement must be sent, as provided in section two hundred and twenty-one.

§ 691. **Duties of police clerks in the city of New York, etc.**—The commissioners of police of the city of New York may designate some person to take charge of all property alleged to be stolen or embezzled, and which may be brought into the police office, and all property taken from the person of a prisoner, and may prescribe regulations in regard to the duties of the clerk or clerks so designated, and to require and take security for the faithful performance of the duties imposed by this section; and it shall be the duty of every officer into whose possession such property may come to deliver the same forthwith to the person so designated.

CHAPTER XIII.

REPRIEVES, COMMUTATIONS AND PARDONS.

SECTION 692. Power of governor to grant reprieves, commutations and pardons.

693. His power, in respect to convictions for treason; duty of the legislature in such cases.

694. Governor to communicate annually to legislature reprieves, commutations and pardons.

695. Report of case; how and from whom required.

696. }

697. } Repealed in 1883.

698. }

§ 692. **Power of governor to grant reprieves, commutations and pardons.**—The governor has power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this chapter.

See State Const., art. 4, § 5; 5 Alb. L. J. 17; 7 id. 210; 6 Crim. L. Mag. 457; 59 Am. Dec. 575; 10 Cr. L. Mag. 292; 18 id. 71, 76, *note*.

A provision in a pardon that it shall not remove disabilities is void. *People v. Pease*, 3 Johns. Cas. 333.

Pardon of one imprisoned for life does not restore the rights of previous marriage or guardianship. 4 R. S. (8th ed.) 2596, § 7.

The court cannot go behind a pardon, though fraudulently obtained. *In re Endymoin*, 8 How. Pr. 478.

In case of a breach of a conditional pardon, the recipient may be remanded, and the original sentence executed. *People v. Potter*, 1 Park. 47.

The governor of a state has power to pardon for contempt. *State, ex rel. Van Orden, v. Sauvinet*, 24 La. Ann. 119; 13 Am. Rep. 115.

The power to pardon after conviction was vested in the governor by the constitution of Arkansas. *Held*, that the exercise of the power to pardon before conviction, by the legislature, was not unconstitutional. *State v. Nichols*, 26 Ark. 74; 7 Am. Rep. 600.

The constitution of Massachusetts placed in the governor the power of pardoning offenses, but provided that no pardon before conviction should avail the party pleading the same. *Held*, that a pardon granted after verdict of guilty and before sentence was valid. *Com. v. Lockwood*, 109 Mass. 323; 12 Am. Rep. 699.

The governor was authorized to grant pardons "after conviction." *Held*, that a pardon after verdict and judgment, but pending an appeal taken by the prisoner, was valid. *State v. Alexander*, 76 N. C. 231; 22 Am. Rep. 675.

The governor of Virginia commuted defendant's sentence for a felony (three years in the penitentiary) to one year in jail, with the consent of the prisoner. *Held*, (1) that the governor had the constitutional authority to do such an act; (2) that the act was a conditional pardon and not a commutation, as it substituted a different punishment; (3) that the prisoner could be lawfully held to the performance of the condition. *Lee v. Murphy*, 22 Gratt. 789; 12 Am. Rep. 563.

The governor may annex to a pardon the condition that the recipient shall refrain from the use of intoxicating liquors as a beverage during the remainder of the term of sentence; that he shall use proper exertions for the support of his mother and sister; and that he shall not during the same time be convicted of any criminal offense in the state; and may provide that for a violation of either condition the recipient shall be liable to summary arrest upon the governor's warrant; and upon the breach of the first condition, may revoke the pardon and recommit the recipient. *Arthur v. Craig*, 48 Iowa, 264; 30 Am. Rep. 395. See 27 Alb. L. J. 241.

A pardon by the president of the United States of one convicted of embezzlement, in a federal court, restores the offender to his right as a voter in the state. *Jones v. Board of Registrars*, 56 Miss. 766; 31 Am. Rep. 835. See, also, 3 Am. St. Rep. 862, note.

A pardon may be granted after the offense is fully expiated. *State v. Foley*, 15 Nev. 64; 37 Am. Rep. 458; citing *People v. Bowen*, 43 Cal. 439; 13 Am. Rep. 148; *U. S. v. Jones*, 2 Wheeler C. C. 451.

§ 693. His power, in respect to convictions for treason; duty of the legislature in such cases. — He may also suspend the execution of the sentence, upon a conviction for treason, until the case can be reported to the legislature, at its next meeting, when the legislature must either pardon or commute the sentence, direct the execution thereof, or grant a further reprieve.

§ 694. Governor to communicate annually to legislature, reprieves, commutations and pardons. — He must annually

communicate to the legislature, each case of reprieve, commutation or pardon; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.

§ 695. **Report of case; how and from whom required.**— When application is made to the governor for a pardon, commutation or reprieve, it shall be the duty of the presiding judge of the court before which the conviction was had, and the district attorney by whom the criminal action was prosecuted, or the district attorney of the county where the conviction was had, holding office at the time of such application, to supply the governor, upon his request therefor, and without delay, with a statement of the facts proved on the trial; or, if a trial was not had, the facts appearing before the grand jury which found the indictment, and of any other facts having reference to the propriety of granting or refusing such pardon, commutation or reprieve.

§§ 696-698 repealed in 1882.

PART V.

OF PROCEEDINGS IN COURTS OF SPECIAL SESSIONS AND
POLICE COURTS.

- TITLE I. OF THE PROCEEDINGS IN COURTS OF SPECIAL SESSIONS IN
THE COUNTIES OTHER THAN NEW YORK.**
- II. OF THE PROCEEDINGS IN THE COURTS OF SPECIAL SES-
SIONS IN THE CITY AND COUNTY OF NEW YORK.**
- III. OF APPEALS FROM THE COURTS OF SPECIAL SESSIONS.**

TITLE I.

OF PROCEEDINGS IN COURTS OF SPECIAL SESSIONS IN THE
COUNTIES OTHER THAN NEW YORK.

- SECTION 699.** Charge to be read to defendant, and he required to plead.
700. The plea, and how put in.
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704. Summoning the jury, and returning the list.
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732. When defendant requests a trial by police court, preliminary examination dispensed with.

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735. By whom executed.

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737. Bail, how and by whom taken.

738. Form of the undertaking.

739. Undertaking, when forfeited, and action thereon.

740. Forfeiture, how and by whom remitted.

§ 699. Charge to be read to defendant, and he required to plead.—In the cases in which the courts of special sessions or police courts have jurisdiction, when the defendant is brought before the magistrate, the charge against him must be distinctly read to him, and he must be required to plead thereto.

People, ex rel., v. Beatty, 39 Hun, 477; 4 N. Y. Cr. Rep. 288.

§ 700. The plea, and how put in—The defendant may plead the same pleas as upon an indictment, as provided in section three hundred and thirty-two. His plea must be oral, and entered upon the minutes of the court.

§ 701. Issue, how tried.—Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the court must proceed to try the issue.

See *People v. Justices*, 74 N. Y. 406; 18 Alb. L. J. 254; *People v. Green*, 4 N. Y. Cr. Rep. 443; *People v. Cook*, 45 Hun, 87.

It is not essential to a valid conviction that the court inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. *People v. Goodwin*, 5 Wend. 251.

A court of special sessions can only acquire jurisdiction over the person of the accused upon his request to be tried before it, or his omission for the space of twenty-four hours to give bail for his appearance. *People v. Berberich*, 20 Barb. 224; 11 How. Pr. 287. See *People v. Fisher*, 20 Barb. 652; 2 Park. 402; overruled in *Wynehamer v. People*, 13 N. Y. 378.

It should affirmatively appear on the record that the prisoner expressly waived his right to trial by jury. *People v. Mallon*, 39 How. Pr. 454.

By an election to be tried by the special sessions the defendant waives all objections to the jurisdiction of the court. *Gill v. People*, 3 Hun, 187; 5 Th. & C. 308.

Special sessions has no jurisdiction of the fraudulent removal of a debtor's property, unless the value be less than \$50. *Thomas v. People*, 19 Wend. 480; *Powers v. People*, 4 Johns. 292.

A conviction for petit larceny is erroneous if neither the complaint nor the warrant show the value of the property nor the place where the offense was committed. *Howell v. People*, 2 Hill, 281.

Special sessions have jurisdiction of petit larceny. *People v. Rawson*, 61 Barb. 619.

Also of the offense of cheating. *People v. Miller*, 14 Johns. 371.

But not of malicious mischief. *Wait v. Green*, 5 Park. 185.

Cannot try and punish as a disorderly person. *People v. Carroll*, 3 Park. 78.

§ 702. Defendant may demand a trial by jury.—Before the court hears any testimony upon the trial, the defendant may demand a trial by jury.

See *People v. Green*, 4 N. Y. Cr. Rep. 448; *People v. Cook*, 45 Hun, 37.

The jurisdiction of the special sessions cannot be sustained unless it affirmatively appear on the face of the record that the prisoner expressly waived his right to a trial by jury. *People v. Mallon*, 39 How. Pr. 454.

Can only gain jurisdiction over the person of the accused upon his request to be tried before it, or his omission for the space of twenty-four hours to give bail for his appearance. *People v. Berberich*, 20 Barb. 224; 11 How. Pr. 289.

One accused before a court of special sessions of selling intoxicating liquors in violation of law is entitled to a jury trial. *People v. Baird* 11 Hun, 289.

Must distinctly elect to be tried by special sessions. *People v. Leid*, 19 Alb. L. J. 400.

§ 703. Jury, how summoned.—If a trial by jury be demanded, the court must forthwith draw from the box or other receptacle kept and used in accordance with the requirements of the Code of Civil Procedure, relative to the drawing of jurors in justice courts in civil cases, twelve of the ballots provided for in section twenty-nine hundred and ninety and twenty-nine hundred and ninety-one of the Code of Civil Procedure to be kept and used by justices of the peace in civil cases. If a person whose name thus drawn, shall, in the opinion of the court, reside more than three miles from the place where the said issue is to be tried, the court may set aside such juror, and in that case draw another ballot, and so can continue until twelve

be drawn to serve as jurors. The court must thereupon insert the names of the persons so drawn in an order directed to any constable of the county, or marshal or police officer of the city or village where the offense is to be tried and having authority to execute process of the court, commanding him to summon the persons therein named to appear before the said court at a time not more than three days from the time of the making of said order, unless the trial of said issue be longer adjourned by consent and at a place named therein, to constitute a jury for the trial of the alleged offense. It shall be the duty of every town or city clerk in this state, within ten days after the taking effect of this act, to make and deliver to every recorder, police justice, or other judicial officer having authority to hold courts of special sessions in their respective towns or cities in accordance with the provisions of this title, a certified copy of the jury list as is now required by section twenty-nine hundred and ninety of the Code of Civil Procedure to be furnished by them to the justices of the peace of their various towns and cities for the drawing of jurors in civil actions, and any such clerk neglecting or refusing so to do shall be deemed guilty of a misdemeanor. The boxes or other receptacles now used by justices of the peace for the purpose of drawing jurors in civil cases shall be used by them for drawing jurors to serve in courts of special sessions as herein provided, and recorders, police justices and other judicial officers empowered to hold such courts of special sessions, as provided by this title, are hereby required to procure and use the same in the manner provided by this section.

In effect, as amended, Sept. 1, 1893; Laws 1893, ch. 127.

§ 704. Summoning the jury, and returning the list.— The court must deliver, or cause to be delivered, the said order to any officer to whom the same is directed and empowered to execute the same. The officer to whom said order is so delivered must thereupon summon personally each of the persons drawn and named therein to serve as such jurors by exhibiting to them the said order and at the same time reading to or stating to them the substance thereof. He shall then make his return to said order certifying that he personally served it upon each of the persons named therein and in each case of his being unable to do so the reason thereof. Any person so summoned not attending at

the time and place and not having sufficient legal excuse for doing so, specified in said order, is hereby declared guilty of contempt of court and is punishable by a fine not exceeding fifty dollars or imprisonment not more than thirty days, or by both such fine and imprisonment.

In effect, as amended, Sept. 1, 1893; Laws 1893, ch. 127.

§ 705. **Depositing ballots in box.** — The names of the persons returned as jurors must be written on separate ballots, folded as nearly alike as possible, so that the name cannot be seen, and must, under the direction of the court, be deposited in a box or other convenient thing.

§ 706. **Drawing the jury.** — The court must then draw out six of the ballots, successively; and if any of the persons whose names are drawn do not appear, or are challenged and set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed.

The special sessions have no authority to try a person by a jury of less than six, though both parties consent thereto. *Germond v. People*, 1 Hill, 343.

If one jury cannot agree, the court may discharge them and summon another. *Vanderwerker v. People*, 5 Wend. 590.

When a jury may consist of six persons. *People, ex rel. Eckler, v. Clark*, 28 Hun, 374.

A statute increasing the jurisdiction of certain courts is not unconstitutional merely because it transfers a class of cases from courts of record where juries are composed of twelve men, to justices' courts, where they consist of six men. *Dawson v. Horan*, 51 Barb. 459; *People, ex rel., v. Met. Board of Health*, 6 Abb. Pr. (N. S.) 105.

The right to a common-law jury trial extends only to cases in which it had been exercised before the adoption of the original constitution. *Duffy v. People*, 6 Hill, 75. See, also, *People v. Justices*, 74 N. Y. 406.

§ 707. **Challenges.** — The same challenges may be taken by either party, to the panel of jurors or to an individual juror, as on the trial of an indictment for a misdemeanor, so far as applicable; and the challenge must, in all cases, be tried by the court.

§ 708. **Talesmen, when and how ordered and summoned.** — If six of the jurors summoned do not attend, or be not obtained, the court may direct the officer to summon any of the bystanders, or others who may be competent, and against whom there is no sufficient cause of challenge, to act as jurors.

§ 709. Punishing officer for not returning list, and issuing new order for jury.— If the officer to whom the order is delivered do not return it, as required by section seven hundred and four, he may be punished by the court, as for contempt ; and the court must issue a new order for the summoning of jurors, in substantially the same form ; upon which the same proceedings must be had as upon the one first issued.

§ 710. Jury, how constituted.— When six jurors appear and are accepted, they constitute the jury.

See cases cited under § 706, *ante*.

§ 711. Their oath.— The court must thereupon administer to the jury the following oath or affirmation : “ You do swear ” [or you do solemnly affirm, as the case may be], “ that you will well and truly try this issue, between the people of the state of New York and A. B., the defendant, and a true verdict give, according to the evidence.”

§ 712. Trial, how conducted.— After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public, and in the presence of the defendant.

§ 713. Jury may decide in court, or retire ; oath of officer on their retirement.— After hearing the proofs and allegations, the jury may either decide in court or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect : “ You do swear that you will keep this jury together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court ; that you will not permit any person to speak to or communicate with them, nor do so yourself, unless it be to ask them whether they have agreed upon a verdict ; and that you will return them into court when they have so agreed, or when ordered by the court.”

§ 714. Delivering verdict and entry thereof.— When the jury have agreed on their verdict, they must deliver it publicly to the court, which must enter it in its minutes.

See *Powers v. People*, 4 Johns. 292; *Thomas v. People*, 19 Wend. 480.

§ 715. Discharge of jury without verdict.—The jury cannot be discharged, after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for some cause within the meaning of sections four hundred and twenty-eight and four hundred and twenty-nine, the court sooner discharge them.

If the jury cannot agree the court may discharge them and summon another. See *Varderwerker v. People*, 5 Wend. 580; *Lattimore v. People*, 10 How. Pr. 336.

§ 716. In such cause, case to be retried.—If the jury be discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial; and so on until a verdict is rendered.

§ 717. Judgment on conviction.—When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon of fine or imprisonment or both, as the case may require; but the fine cannot exceed fifty dollars, nor the imprisonment six months.

See 28 Alb. L. J. 480, 520; § 719, *post*; *People v. Palmer*, 48 Hun, 406; 6 N. Y. State Rep. 841; 109 N. Y. 418; *People v. Rawson*, 61 Barb. 619; *People, ex rel., v. Sadler*, 2 N. Y. Cr. Rep. 438; *People, ex rel., v. Smith*, 28 N. Y. State Rep. 307.

On a conviction in a court of special sessions, the sentence must be pronounced by the court as such; and the record must show that the court was then in session. *Lattimore v. People*, 10 How. Pr. 336.

After a plea of guilty there is nothing further for a court to do than to pronounce sentence. The plea of guilty is like the verdict of guilty. There is no duty in the court "to convict," but only to sentence. When the defendant pleads guilty it is not necessary that there should be any conviction. *People, ex rel. Evans, v. McEwen*, 67 How. Pr. 105; 2 N. Y. Cr. Rep. 313.

The Albany special sessions has jurisdiction to impose a fine of \$500 upon a person convicted of petit larceny. *Matter of Hallenbeck*, 65 How. Pr. 401.

The relator, having been convicted by the court of sessions of Otsego county of the offense of assault in the third degree, was sentenced to imprisonment in a state prison for one year. Upon an appeal from an order made by a county judge, denying an application for a discharge of the relator upon the return to a writ of *habeas corpus*, *held*, that although under the provisions of the Penal Code the court had no power to sentence the relator to an imprisonment in a state prison upon a conviction of an assault in the third degree, but could only sentence him to be imprisoned in a penitentiary or county jail, yet the order denying the application should be affirmed for the reason that the error of the court was not one which could be reviewed upon *habeas corpus*. For the further reason that although the sentence was absolutely void, yet the

relator was properly in the custody of the sheriff as a convicted but unsentenced prisoner. *People v. Kelly*, 32 Hun, 536; affirmed, 97 N. Y. 212.

The relator was convicted before a court of special sessions of having disposed of personal property, upon which he had previously executed a chattel mortgage, and was sentenced to pay a fine of \$250, and to stand committed to the county jail until the fine should be satisfied, not exceeding one year. *Held*, that as the power of a court to inflict punishment is restricted by this section to a fine not exceeding \$50, or an imprisonment not exceeding six months, the sentence imposed upon the relator was void. *People v. Risley*, 38 Hun, 285; 4 N. Y. Cr. Rep. 109; *People v. Carter*, 48 Hun, 167; 14 Civ. Proc. 245; *People v. Nash*, 12 Week. Dig. 545; *People v. Bork*, 96 N. Y. 188-200; *People, ex rel., v. Liscomb*, 60 id. 559.

§ 718. Judgment of imprisonment until fine be paid; extent of imprisonment.—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.

See § 484, *ante*; *Matter of Hoffman*, 1 N. Y. Cr. Rep. 484; *People, ex rel., v. Risley*, 38 Hun, 281; 4 N. Y. Cr. Rep. 110; *People v. Sutton*, 6 N. Y. Supp. 96; 24 State Rep. 726; *Matter of Bray*, 84 id. 642.

§ 719. Defendant, on acquittal, to be discharged; order that prosecutor pay the costs.—When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings, or to give satisfactory security, by a written undertaking, with one or more sureties, to pay the same to the county within thirty days after the trial.

See *People v. Norton*, 33 Hun, 277; 2 N. Y. Cr. Rep. 324; *People v. Carr* 28 State Rep. 287; 54 Hun, 445.

§ 720. Judgment against prosecutor for costs.—If the prosecutor do not pay the costs or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced and appealed from, in all respects, in the same manner as a judgment rendered by a justice court held by a justice of the peace.

See *People v. Norton*, 33 Hun, 277; 2 N. Y. Cr. Rep. 324; *People v. Carr*, 28 State Rep. 287; 54 Hun, 445; *People v. Germond*, 1 Hill, 348.

The record of the conviction in a court of special sessions must show the jurisdiction of the justices. *Powers v. People*, 4 Johns. 292; *Thomas v. People*, 19 Wend. 480.

A *mittimus* issued upon conviction need not set forth any fact not required by law to be stated in the record. *People v. Moore*, 3 Park. 465.

Where a return to a writ of *habeas corpus* shows that the relator is held under a commitment issued by a court of special sessions after a trial and conviction by it, the only question presented is, whether or not such court has jurisdiction to try the relator and issue the commitment. *People v. Neilson*, 16 Hun, 214.

It is not necessary that the commitment should contain the names of the witnesses, or the testimony given by them, it is sufficient if it contain a brief statement of the offense charged and the conviction and judgment thereon. *People v. Neilson*, 16 Hun, 214. See, also, *Matter of Hogan*, 55 How. Pr. 458; *Matter of Sweetman*, 1 Cow. 144.

The court cannot acquire jurisdiction to try a prisoner for an offense unless it appear affirmatively in the proceedings had before trial, that the prisoner expressly waived his right to a trial by jury. It will not do to ask the prisoner if he elects to be tried by the court of special sessions, but the question must be clearly put to him if he waives a trial by jury; and after answering "yes" or "no," that fact must appear clearly and affirmatively. Even if the return of the special sessions shows that the question had been put to the prisoner whether he had waived a trial by jury or not, he has a right to traverse such a return and show its falsity — the court not being a court of record. *People v. Mallon*, 39 How. Pr. 454. *Contra*, *People v. Goodwin*, 5 Wend. 251.

§ 722. Certificate of conviction; its form. — If the defendant have pleaded guilty, instead of the second paragraph, the certificate must state substantially as follows: "And the above-named A. B. having been thereupon duly convicted, upon a plea of guilty."

This form need only to be followed substantially. *People, ex rel. Evans, v. McEwen*, 67 How. Pr. 113; 2 N. Y. Cr. Rep. 313.

§ 723. Certificate, when filed. — Within twenty days after the conviction, the court must cause the certificate to be filed in the office of the clerk of the county.

See *People v. Holmes*, 41 Hun, 56; 5 N. Y. Cr. Rep. 130.

This section is merely directory, and it is sufficient if the record is made in due form though not filed at the time required by the statute. *People, ex rel., v. Baker*, 19 State Rep. 487.

§ 724. **Certificate, conclusive evidence.** — The certificate, made and filed as prescribed in the last two sections, or a certified copy thereof, is conclusive evidence of the facts stated therein.

See *People, ex rel., v. Baker*, 19 State Rep. 487; *People, ex rel. Evans, v. McEwen*, 67 How. Pr. 113; 2 N. Y. Cr. Rep. 312; *Matter of Nichols*, 19 Abb. N. C. 138.

§ 725. **Judgment, by whom executed.** — The judgment must be executed by the sheriff of the county, or by a constable, marshal or policeman of the city, village or town in which the conviction is had, upon receiving a copy of the certificate prescribed in section seven hundred and twenty-one, certified by the court or the county clerk.

See *People v. Holmes*, 41 Hun, 56; 5 N. Y. Cr. Rep. 130; *People, ex rel., v. McEwen*, 67 How. Pr. 113; 2 N. Y. Cr. Rep. 312; *People, ex rel. McGrath, v. Board, etc.*, 119 N. Y. 126.

§ 726. **Fine, by whom received before commitment, and how applied.** — If a fine imposed be paid before commitment, it must be received by the court, and within thirty days after its receipt, paid by such court into the county treasury.

See *People, ex rel., v. Board*, 17 State Rep. 875.

§ 727. **Fine, to whom paid after commitment, and how applied.** — If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person; who must in like manner, within thirty days after the receipt thereof, pay it into the county treasury.

See *People, ex rel., v. Board*, 17 State Rep. 875.

§ 728. **Proceedings against magistrate or sheriff, on neglect to pay fine into county treasury.** — If the court or sheriff receiving the fine, fail to pay it into the county treasury, the county treasurer must immediately commence an action therefor against the sheriff or the magistrates comprising the court in the name of the county.

§ 729. **Subpoenas for witnesses, and punishing them for disobedience.** — The court may issue subpoenas for witnesses, as provided in section six hundred and eight, and punish disobedience thereof, as provided in section six hundred and nineteen.

§ 730. **Punishing jurors for non-attendance.**—If a person summoned as a juror fail to appear, he may be punished by a fine not exceeding five dollars imposed by the court, by an order entered in his minutes. The order is deemed a judgment, in all respects, in favor of the poor of the town or city.

§ 731. **No fees to jurors or witnesses.**—No fees are payable to a juror or witness, for his service or attendance in a court of special sessions.

See § 616, *ante*.

§ 732. **When defendant requests a trial by police court, preliminary examination dispensed with.**—When the defendant, upon being brought before the magistrate, requests a trial by a court of special sessions, the preliminary examination of the case is dispensed with.

§ 733. **During time allowed for bail, and until judgment, defendant to be continued in custody of officer or committed to jail.**—During the time allowed to the defendant to give bail, and until judgment is given, he may be continued in the custody of the officer, or committed to the jail of the county to answer the charge, as the magistrate may direct.

§ 734. **Form of commitment.**—The commitment must be signed by the magistrate, by his name of office, and must be in substantially the following form:

"The sheriff of the county of _____, is required to receive and detain A. B., who stands charged before me for [designating the offense, generally], to answer the charge before a court of special sessions in the town [or city] of _____ [as the case may be].

"Dated at the town [or city] of _____, the _____ day of _____, 18 _____.

"C. D., justice of the peace of the town [or city] of _____, [as the case may be]."

See authorities cited under § 721, *ante*.

It is not necessary to set forth in a warrant of commitment issued upon a judgment of a court of special sessions that the prisoner was convicted of petit larceny charged as a first offense; it is sufficient if it appears that the conviction was for an offense of which said court had jurisdiction. *People, ex rel., v. Fina*, 87 N. Y. 533.

§ 735. **By whom executed.**— When committed, the defendant must be delivered to the custody of the proper officer, by any peace officer in the county to whom the magistrate may deliver the commitment.

§ 736. **Defendant may be admitted to bail.**— Either before or after his committal, or upon being committed, the defendant must, if he require it, be admitted to bail.

§ 737. **Bail, how and by whom taken.**— The bail must be taken by the magistrate, by a written undertaking, executed by the defendant, with one or more sufficient sureties approved by the magistrate, in a sum not exceeding two hundred dollars.

§ 738. **Form of the undertaking.**— The undertaking must be in substantially the following form:

“ A. B., having been duly charged before C. D., a justice of the peace in the town [or city] of , [as the case may be] with the offense of [designating the offense generally]. We undertake jointly and severally that he shall appear thereon from time to time, until judgment, at a court of special sessions in the town, or village [or city] of , [as the case may be], competent to try the case, or that he will pay to the county of [naming the county in which the court is held] the sum of dollars [inserting the sum fixed by the magistrate].

“ Dated at the town [or city] of [as the case may be].”

§ 739. **Undertaking, when forfeited, and action thereon.**— If the defendant fail to appear according to the undertaking, the court, unless a sufficient excuse be shown, must declare the undertaking of bail forfeited, and the county treasurer must immediately commence an action for the recovery of the sum mentioned therein, in the name of the county.

§ 740. **Forfeiture, how and by whom remitted.**— The county court of the county, or in the city of New York, the court of common pleas of that city, may remit the forfeiture or any part thereof, in the cases and in the manner provided in the Code of Civil Procedure.

TITLE II.

OF THE PROCEEDINGS IN THE COURT OF SPECIAL SESSIONS
IN THE CITY AND COUNTY OF NEW YORK.

Section 741. Police courts in New York, to proceed as prescribed in last title, except as provided in next seven sections.

742. In what cases to proceed to trial.

743. If jury demanded, magistrate to proceed to examination of charge.

744. Trial to be before the court, without a jury.

745. Clerk to issue subpoena, sign certificate of judgment, and enter proceedings of court and sentences upon convictions.

746. Fines before committal, to be paid to clerk; his accounts, when and to whom rendered.

747. All other fines to be paid to sheriff; his account thereof, when and to whom rendered.

748. No transcript of conviction to be filed; certified copy of minutes, conclusive evidence.

§ 741. Police courts in New York, to proceed as prescribed in last title, except as provided in next seven sections. — The court of special sessions, in the city and county of New York, must proceed upon a criminal charge in the manner prescribed in the last title, except as provided in the next seven sections, and by special statutes.

See *People, ex rel., v. Board*, 17 State Rep. 875; *People, ex rel. Murray, v. Justices*, 74 N. Y. 406; 18 Alb. L. J. 254.

§ 742. In what cases to proceed to trial. — When the court of special sessions in the city and county of New York has jurisdiction, it must proceed to the trial in the following cases:

1. When the defendant has requested to be tried in such court;
2. When (having omitted for twenty-four hours to give bail, as required by the magistrate before whom he was brought, for his appearance at the next court of general sessions of the city and county of New York) a jury is not demanded by him, on being brought before the court of special sessions for trial.

§ 743. If jury demanded, magistrate to proceed to examination of charge. — If, in the case mentioned in the second subdivision of the last section, a jury be demanded, the court of special sessions must proceed to the examination of the charge, and hold the defendant to answer or discharge him. in

same manner as the magistrate before whom he was originally brought might have done.

§ 744. **Trial to be before court, without a jury.** — The trial must, in all cases, be before the court without a jury.

§ 745. **Clerk to issue subpoenas, sign certificate of judgment, and enter proceedings of court and sentences upon convictions.** — Subpoenas for witnesses, and the certificate of the judgment, must be signed by the clerk of the court, who must also enter all the proceedings of the court, and the sentences upon convictions, in a book of minutes, and when necessary, certify the proceedings of the court.

§ 746. **Fines before committal, to be paid to clerk; his accounts, when and to whom rendered.** — Fines, imposed by the court, must be received by the clerk, if paid before committal in execution of the judgment. He must, every thirty days, render to the comptroller of the city, accounts of the fines imposed and received by him, and of the expenses attending the court.

§ 747. **All other fines to be paid to sheriff; his account thereof, when and to whom rendered.** — All fines, not paid to the clerk, as provided in the last section, must be received by the sheriff of the city and county of New York; who must, within thirty days thereafter, pay them to the comptroller of the city, in the same manner as he is required to pay fines imposed by the court of general sessions of the city and county of New York, and received by him.

§ 748. **No transcript of conviction to be filed; certified copy of minutes, conclusive evidence.** — No transcript of a conviction, had in a court of special sessions in the city and county of New York, need be certified or filed; but a copy of the minutes of the conviction, certified by the clerk, is conclusive evidence of the facts contained therein.

TITLE III.

OF APPEALS FROM COURTS OF SPECIAL SESSIONS.

- SECTION 749.** Judgment of special sessions, reviewable only upon appeal.
750. Appeal, for what causes allowed.
751. Appeal, how taken.
752. How allowed.
753. Discharge of defendant from custody, upon undertaking.
754. Undertaking, when and with whom filed.
755. Delivery of affidavit, and allowance of appeal, to magistrate or clerk of police court, within five days after allowance
756. Return, when and how made.
757. Compelling return.
758. Ordering and compelling further or amended return.
759. Appeal, by whom and how brought to argument.
760. If not brought to argument, as provided in last section, to be dismissed, unless continued for cause shown.
761. Service of return on district attorney, and consequences of failure.
762. If brought to hearing by defendant, appeal must be argued, though no one oppose, etc.
763. Appeal to be heard on original return.
764. What judgment may be rendered.
765. Judgment to be entered on the minutes.
766. Order upon judgment for affirmance.
767. Order upon judgment of reversal.
768. If new trial ordered, to be had in court of sessions; proceedings thereon.
769. Proceedings to carry judgment upon appeal into effect, to be had in court of sessions.
770. On judgment of court of sessions, defendant may appeal to supreme court; his admission to bail.
771. Judgment of supreme court upon appeal, final.
772. Proceedings to carry into effect judgment of supreme court.

§ 749. Judgment of special sessions reviewable only upon appeal.— A judgment upon conviction, rendered by a court of special sessions, police court, police magistrate, or justice of the peace, in any criminal action or proceedings or special proceeding of a criminal nature, including a judgment of commitment made under section two hundred and ninety-one of the Penal Code, may be reviewed by the court of sessions of the county, upon an appeal as prescribed by this title, and not otherwise; and any appeals heretofore taken and allowed from a judgment of any police court or police magistrate in the man-

ner that appeals are directed to be taken and allowed by this title, and now pending undetermined in any court of this state, are hereby declared to be legal and valid and of the same force and effect as if taken after the passage of this act. An appeal from a judgment of commitment made under section two hundred and ninety-one of the Penal Code may be allowed to any person having, previous to such commitment, a right to the custody of the child; but upon such appeal, in addition to the notice and papers required by this title to be served on appeals in criminal actions, notice of all proceedings and copies of the affidavit and allowance of appeal therein must be served upon the institution named in the commitment, and upon the society mentioned in section two hundred and ninety-three of the Penal Code, if there be one within the county. Such institution and society, or either, shall have the right to move to argue or dismiss, and to be heard upon the argument of such appeal; and shall have the like right to appeal from the judgment of the court of sessions of the county to the supreme court as is conferred by section seven hundred and seventy of this Code upon a defendant, and to the court of appeals by section five hundred and nineteen of this Code; and pending any appeal and until the final determination thereof the child named in the commitment must remain in the custody of the institution therein specified.

See *People v. Trumble*, 1 N. Y. Cr. Rep. 443; 29 Hun, 205; *People v. Norton*, 2 N. Y. Cr. Rep. 322; 33 Hun, 277; *People, ex rel. Scherer, v. Walsh*, 87 How. Pr. 482; 33 Hun, 345; 2 N. Y. Cr. Rep. 325; *People v. Carr*, 54 Hun, 444; *People v. Vitan*, 20 Abb. N. C. 298; *Killoran v. Barton*, 26 Hun, 648; *People, ex rel., v. Court of Sessions*, 45 id. 55; 9 State Rep. 608.

§ 750. Appeal, for what causes allowed.—An appeal may be allowed for an erroneous decision or determination of law or fact upon the trial.

§ 751. Appeal, how taken.—For the purpose of appealing, the defendant, or some one on his behalf, must within ten days after the judgment, or within twenty days after the commitment where the appeal is from the latter, make an affidavit stating the fact showing the alleged errors in the proceedings or conviction or commitment complained of, and must within that time present it to the county judge or a justice of the supreme court, or in the

city and county of New York, to the recorder or a judge authorized to hold a court of general sessions in that city, and may apply thereon for the allowance of the appeal.

See *People v. McGann*, 43 Hun, 57; *People, ex rel., v. Beatty*, 4 N. Y. Cr. Rep. 287; 39 Hun, 477.

§ 752. How allowed.—If, in the opinion of the judge, it is proper that the question arising on the appeal should be decided by the court of sessions, he must indorse on the affidavit an allowance of the appeal to that court.

See *People, ex rel. Baker, v. Beatty*, 4 N. Y. Cr. Rep. 287; 39 Hun, 477.

§ 753. Discharge of defendant from custody, upon undertaking.—Upon allowing the appeal, if satisfied that there is a reasonable doubt whether the conviction should stand, but not otherwise, the judge may take from the defendant a written undertaking, with such sureties as he may approve, that the defendant will abide the judgment of the court of sessions upon the appeal; and may thereupon order that he be discharged from imprisonment, on service of the order upon the officer having him in custody, or if he be not in custody, that all proceedings on the judgment be stayed. [*Amended 1892, ch. 279; in effect Sept. 1, 1891.*]

§ 754. Undertaking, when and with whom filed.—The undertaking upon the appeal must be immediately filed with the clerk of the court of sessions.

§ 755. Delivery of affidavit, and allowance of appeal, to magistrate or clerk of police court, within five days after allowance.—The affidavit and allowance of the appeal must be delivered to the magistrate, or clerk of the court rendering the judgment, within five days after the allowance of the appeal, and when so delivered the appeal is deemed taken.

§ 756. Return, when and how made.—The magistrate or court rendering the judgment, must make a return to all the matters stated in the affidavit, and must cause the affidavit and return to be filed in the office of the clerk of the court of sessions, within ten days after the service of the affidavit and allowance of the appeal.

In *People v. McGann*, 43 Hun, 57, the court say: "When the appeal is taken it must be presumed the appellant knows what alleged errors he wants to review. The return is made with reference to such errors only. If this be not true, all sorts of technical objections may be urged upon appeal when but one

worthless objection is alleged in the affidavit. It should be presumed that the proceedings were legal and valid unless it is affirmatively shown that they are otherwise."

§ 757. Compelling return. — If the return be not made within the time prescribed in the last section, the court of sessions, or the presiding judge thereof, may order that a return be made within a specified time which may be deemed reasonable; and the court may, by attachment, compel a compliance with the order.

§ 758. Ordering and compelling further or amended return. — If the return be defective, a further or amended return may be ordered, and the order may be enforced in the manner provided in the last section.

§ 759. Appeal, by whom and how brought to argument. When the return is made, the appeal may be brought to argument by the defendant, on any day in term, upon a notice of not less than five days before the term, to the district attorney of the county.

§ 760. If not brought to argument, as provided in last section, to be dismissed, unless continued for cause shown. If the defendant omit to bring the appeal to argument, as provided in the last section, the court must dismiss it, unless it continue the same, by special order, for cause shown.

§ 761. Service of return on district attorney, and consequences of failure. — The defendant must serve upon the district attorney, a copy of the return, with or before the notice of argument. If he fail to do so, the appeal must be dismissed, upon proof of the failure, unless the court otherwise direct.

§ 762. If brought to hearing by defendant, appeal must be argued, though no one oppose, etc. — If the appeal be brought to hearing by the defendant, it must be argued, though no one appear to oppose; but if brought on by the district attorney, he may take judgment of affirmance, unless the defendant appear to argue the appeal.

§ 763. Appeal to be heard on original return. — The appeal must be heard upon the original return; and no copy thereof need be furnished for the use of the court.

§ 764. What judgment may be rendered.— After hearing the appeal the court must give judgment without regard to technical errors or defects which have not prejudiced the substantial rights of the defendants, and may render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment, in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial, or may modify the sentence.

See *People, ex rel. Stokes, v. Risley*, 33 Hun, 282; 4 N. Y. Cr. Rep. 111; *People v. Outler*, 28 Hun, 465; 1 N. Y. Cr. Rep. 178; *People v. McIntosh*, 5 id. 39; *People v. Harris*, 28 N. Y. State Rep. 801; *People v. Upton*, 29 id. 779; *People v. Moore*, 50 Hun, 359; *People v. Starks*, 17 N. Y. State Rep. 237, 238.

§ 765. Judgment to be entered on the minutes.— When judgment is given upon the appeal, it must be entered upon the minutes.

§ 766. Order upon judgment for affirmance.— If the judgment be affirmed, the court must direct its execution, and if the defendant be discharged on bail, after the commencement of the execution of a judgment of imprisonment, must commit him to the proper custody for the remainder of his term of imprisonment.

§ 767. Order upon judgment of reversal.— If the judgment be reversed, and the defendant be imprisoned in pursuance of the judgment of the police court, the court of sessions must order him to be discharged.

See *People v. Trumble*, 1 N. Y. Cr. Rep. 446.

§ 768. If new trial ordered, to be had in court of sessions; proceedings thereon.— If a new trial be ordered, it must be had in the court of sessions, in the same manner as upon an issue of fact on an indictment; and that court may proceed to judgment and execution, as in an action prosecuted by indictment. But where the appeal was from a judgment of commitment made under section two hundred and ninety-one of the Penal Code, the new trial shall be had before the court of sessions without a jury.

§ 769. Proceedings to carry judgment upon appeal into effect, to be had in court of sessions.— If any proceedings be necessary to carry the judgment upon the appeal into effect, they must be had in the court of sessions.

§ 770. On judgment of court of sessions, defendant may appeal to supreme court; his admission to bail.—If the judgment on the appeal be against the defendant, he may appeal therefrom to the supreme court, in the same manner as from a judgment in an action prosecuted by indictment, and may be admitted to bail upon the appeal, in like manner.

See *People v. Trumble*, 1 N. Y. Cr. Rep. 447; *People, ex rel., v. Court of Sessions*, 45 Hun, 54.

No appeal can be taken by the people from a judgment of a court of sessions reversing, on an appeal taken thereto, a judgment of a court of special sessions, convicting the defendant of an assault. *People v. Snyder*, 44 Hun, 193.

§ 771. Judgment of supreme court upon appeal, final.—The judgment of the supreme court upon the appeal is final, except that where the original appeal was from a judgment of commitment of a child, either party may appeal to the court of appeals in like manner as a defendant under section five hundred and nineteen of this Code.

See *People, ex rel., v. Court of Sessions*, 45 Hun, 54; *People v. Snyder*, 44 id. 193.

§ 772. Proceedings to carry into effect judgment of supreme court.—The same proceedings must be had, to carry into effect the judgment of the supreme court upon the appeal, as if it had been taken upon a judgment in an action prosecuted by indictment.

PART VI.

OF SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

- TITLE**
- I. OF CORONERS' INQUESTS, AND THE DUTIES OF CORONERS.
 - II. OF SEARCH WARRANTS.
 - III. OF THE OUTLAWRY OF PERSONS CONVICTED OF TREASON.
 - IV. OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.
 - V. OF PROCEEDINGS RESPECTING BASTARDS.
 - VI. OF PROCEEDINGS RESPECTING VAGRANTS.
 - VII. OF PROCEEDINGS RESPECTING DISORDERLY PERSONS.
 - VIII. OF PROCEEDINGS RESPECTING THE SUPPORT OF POOR PERSONS.
 - IX. OF PROCEEDINGS RESPECTING MASTERS, APPRENTICES AND SERVANTS.
 - X. OF CRIMINAL STATISTICS.
 - XI. MISCELLANEOUS PROVISIONS RESPECTING PROCEEDINGS OF A CRIMINAL NATURE.

TITLE I.

OF CORONERS' INQUESTS, AND THE DUTIES OF CORONERS.

- SECTION** 773. In what cases coroner to summon a jury; number of jurors to be summoned.
774. Jury to be sworn.
775. Witnesses to be subpoenaed.
776. Compelling attendance of witnesses, and punishing their disobedience.
777. Verdict of the jury.
778. Testimony, how taken and filed.
779. If defendant arrested before inquisition filed, depositions to be delivered to magistrate, and by him returned.
780. Warrant for arrest of party charged by verdict.
781. Form of warrant.
782. Warrant, how executed.
783. Proceedings of magistrate, on defendants being brought before him.
784. Clerk with whom inquisition is filed, to furnish magistrate with copy of the same and of testimony returned therewith.
785. Coroner to deliver money or property found, on deceased, to county treasurer.

SECTION 786. County treasurer to place money to credit of county; and to sell other property and place proceeds to credit of county.

787. Money, when and how paid to representatives of deceased.

788. Supervisors to require statement under oath, from coroner, before auditing his accounts.

789. In New York, police justice may perform duties of coroner, during his inability.

790. Compensation of coroners.

§ 773. In what cases coroner to summon a jury; number of jurors to be summoned.—Whenever a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or has committed suicide, he must go to the place where the person is and forthwith inquire into the cause of the death or wounding, and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, if such death or wounding be of a criminal nature, to appear before him forthwith at a specified place, to inquire into the cause of the death or wound, and if it shall appear from the sworn examination of the informant or complainant, or if it shall appear by the evidence taken on or during the inquisition, that any person or persons are chargeable with the killing or wounding, or that there is probable cause to believe that any person or persons are chargeable therewith, and if such person or persons be not in custody, he must forthwith issue a warrant for the arrest of the person or persons charged with such killing or wounding; and upon the arrest of any person or persons chargeable therewith, he must be arraigned before the coroner for examination, and the said coroner shall have power to commit the person or persons so arrested to await the result of the inquisition. Any coroner shall be disqualified from acting as such in any case where the person killed or dangerously wounded or dying suddenly, as aforesaid, is a co-employee with said coroner, of any person or persons, association or corporation, or where it appears that the killing or wounding has been occasioned, directly or indirectly, by the employer of said coroner. [*Amended 1892, ch. 562; in effect May 13, 1892.*]

See Penal Code, § 808; 78 Law Times, 332; 14 Alb. L. J. 87; *People v. Mondon*, 103 N. Y. 211; *People v. Willet*, 92 id. 29; *People v. Fitzgerald*, 105 id. 146; 43 Hun, 35; *Crisfield v. Perine*, 15 id. 202; *County of Lancaster v. Mishler*, 27 Alb. L. J. 342.

In *People v. Devine*, 44 Cal. 458, the court say: "At common law, as well as under the statute of Edward I, and our statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest *super visum corporis* is in the performance of functions judicial in their character (*E. v. White*, 8 E. & E. 144; Rep. Const. Ct. So. Car. 231; 32 Miss. 375); so distinctly judicial that he is protected under the principles which protect judicial

officers from responsibility in a civil action brought by a private person. *Garnett v. Ferrand*, 6 Barn. & Cress. 611."

A statute made railroad companies liable "for all expenses of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." *Held*, unconstitutional so far as it attempts to make railroad companies liable in cases where they have violated no law or been guilty of no negligence. *Ohio Railway Co. v. Lackey*, 78 Ill. 55, 259.

§ 774. Jury to be sworn.—When six or more of the jurors appear, they must be sworn by the coroner to inquire who the person was, and when, where and by what means he came to his death or was wounded, as the case may be, and into the circumstances attending the death or wounding, and to render a true verdict thereon, according to the evidence offered to them, or arising from the inspection of the body.

§ 775. Witnesses to be subpoenaed.—The coroner may issue subpoenas for witnesses, returnable forthwith, or at such time and place as he may appoint. He must summon and examine as witnesses, every person who, in his opinion, or that of any of the jury, has any knowledge of the facts; and he must summon as a witness a surgeon or physician, who must, in the presence of the jury, inspect the body, and give a professional opinion as to the cause of the death or wounding.

See *People v. Beigler*, 3 Park. 316.

The prisoner has no right to cross-examine witnesses before the coroner, or to produce witnesses in his own behalf. *People v. Collins*, 20 How. Pr. 111; 11 Abb. Pr. 406.

When a coroner directs a post-mortem examination to be made, he may, in his discretion, determine whether any and what persons shall be present besides the surgeons. *Crisfield v. Perine*, 15 Hun, 200.

And it seems that one suspected of the murder of the person to be examined has no right to be present; he loses no legal right by being excluded. *Id.*

The coroner of New York had no power under the acts of 1868 and 1871, to bind the city to the expense of a chemical analysis of the remains of a deceased person to ascertain the cause of death. *Doremus v. New York*, 6 Daly, 121.

This power has been since conferred by the act of 1875, chapter 620.

The coroner is personally liable to a physician employed by him to examine a body at an inquest, and must charge the same in his account against the county. *Van Hoesenburgh v. Hasbrouck*, 45 Barb. 197. See, also, *People, ex rel. Sherman, v. Supervisors*, 30 How. Pr. 173; *Stevens v. Com'rs*, 46 Ind. 541.

§ 776. Compelling attendance of witnesses, and punishing their disobedience.—A witness served with a sub-

pœna may be compelled to attend and testify, or punished by the coroner for disobedience, as upon a subpœna issued by a magistrate, as provided in this Code.

See Code Civ. Proc., §§ 8-13, 853-863; *People v. Mondon*, 103 N. Y. 211.

§ 777. **Verdict of the jury.**—After inspecting the body and hearing the testimony, the jury must render their verdict, and certify it by an inquisition in writing, signed by them, and setting forth who the person killed or wounded is, and when, where and by what means he came to his death or was wounded; and if he were killed or wounded, or his death were occasioned by the act of another, by criminal means, who is guilty thereof, in so far as by such inquisition they have been able to ascertain.

See 11 Crim. Law Mag. 119; *People v. Mondon*, 103 N. Y. 216; 4 N. Y. Cr. Rep. 556.

A coroner has no power to hold a second inquest "*super visum corporis*," unless the first has been vacated or set aside or is absolutely void. *People v. Budge*, 4 Park. 519.

§ 778. **Testimony, how taken and filed.**—The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and must be forthwith filed by him, with the inquisition, in the office of the clerk of the court of sessions of the county, or of a city court having power to inquire into the offense by the intervention of a grand jury.

See § 395, *ante*; *Matter of Ramscar*, 1 N. Y. Cr. Rep. 83; 63 How. Pr. 255; 10 Abb. N. C. 442; *People v. Mondon*, 103 N. Y. 211; 4 N. Y. Cr. Rep. 126; *People v. Taylor*, 43 Hun, 419; *People v. McGloin*, 91 N. Y. 241.

Evidence on a trial for murder that a witness who testified before the coroner's inquest is a resident of another state is sufficient to render admissible his testimony before the coroner. *Johnson v. State*, 10 S. W. Rep. 235.

§ 779. **If defendant arrested before inquisition filed, depositions to be delivered to magistrate, and by him returned.**—If, however, the defendant be arrested before the inquisition can be filed, the coroner must deliver it with the testimony to the magistrate before whom the defendant is brought, as provided in section seven hundred and eighty-one, who must return it with the depositions and statement taken before him, in the manner prescribed in section two hundred and twenty-one.

§ 780. Warrant for arrest of party charged by verdict.

If the jury find that the person was killed or wounded by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another, by criminal means, and the party committing the act be ascertained by the inquisition, and be not in custody, the coroner must issue a warrant, signed by him with his name of office, into one or more counties, as may be necessary, for the arrest of the person charged.

See *Matter of Ramscar*, 63 How. Pr. 255; 1 N. Y. Cr. Rep. 33.

§ 781. Form of warrant.—The coroner's warrant must be in substantially the following form: County of Albany (or as the case may be). In the name of the people of the state of New York, to any sheriff, constable, marshal or policeman in this county: An inquisition having been this day found by a coroner's jury before me, stating that A. B. has come to his death by the act of C. D. by criminal means (or as the case may be), as found by the inquisition; or, information having been this day laid before me that A. B. has been killed or dangerously wounded by C. D., by criminal means (or as the case may be), you are hereby commanded forthwith to arrest the above-named C. D. and bring him before me, or in the case of my absence or inability to act, before the nearest or most accessible coroner in this county.

Dated at the city of Albany (or as the case may be), this day of , 18 .

E. F.,

Coroner of the County of Albany.

[Or as the case may be.]

See *Matter of Ramscar*, 63 How. Pr. 255; 1 N. Y. Cr. Rep. 33.

§ 782. Warrant, how executed.—The coroner's warrant may be served in any county; and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information, except that when served in another county it need not be indorsed by a magistrate of that county.

See *Matter of Ramscar*, 63 How. Pr. 255; 1 N. Y. Cr. Rep. 33; *Slater v. Wood*, 9 Bosw. 15.

§ 783. Proceedings of magistrate on defendant's being brought before him.—The magistrate or coroner, when the defendant is brought before him, must proceed to examine the charge contained in the inquisition or information, and hold the defendant to answer, or discharge him therefrom in the same manner, in all respects, as upon a warrant of arrest on an information.

See *Matter of Ramscar*, 68 How. Pr. 255; 1 N. Y. Cr. Rep. 83.

§ 784. Clerk with whom inquisition is filed to furnish magistrate with copy of the same and of testimony returned therewith.—Upon the arrest of the defendant, the clerk with whom the inquisition is filed, must, without delay, furnish to the magistrate or coroner before whom the defendant is brought, a certified copy of the inquisition and of the testimony returned therewith.

See *Matter of Ramscar*, 1 N. Y. Cr. Rep. 83; 68 How. Pr. 255.

§ 785. Coroner to deliver money or property found on deceased to county treasurer.—The coroner must, within thirty days after an inquest upon a dead body, deliver to the county treasurer any money or other property which may be found upon the body, unless claimed in the mean time by the legal representatives of the deceased. If he fail to do so, the treasurer may proceed against him for its recovery, by a civil action in the name of the county.

See *Sutton v. Public Adm'r*, 4 Dem. 85.

§ 786. County treasurer to place money to credit of county, and to sell other property and place proceeds to credit of county.—Upon the delivery of money to the treasurer he must place it to the credit of the county. If it be other property, he must, within thirty days, sell it at public auction, upon reasonable public notice; and must, in like manner, place the proceeds to the credit of the county.

See *Sutton v. Public Adm'r*, 4 Dem. 85.

§ 787. Money, when and how paid to representatives of deceased.—If the money in the treasury be demanded within six years, by the legal representatives of the deceased, the treasurer must pay it to them, after deducting the fees and

expenses of the coroner and of the county, in relation to the matter, or it may be so paid at any time thereafter, upon the order of the board of supervisors.

See Sutton v. Public Adm'r, 4 Dem. 85.

§ 788. **Supervisors to require statement under oath from coroner, before auditing his accounts.**—Before auditing and allowing the account of the coroner, the board of supervisors must require from him a statement in writing, of any money or other property found upon persons on whom inquests have been held by him, verified by his oath, to the effect that the statement is true, and that the money or property mentioned in it has been delivered to the legal representatives of the deceased, or to the county treasurer.

See Morehouse's Supervisors Manual, pp. 280, 281, 486.

§ 789. **In New York, police justices may perform duties of coroner, during his inability.**—In the city of New York, if the coroner be absent, or be unable for any cause to attend, the duties imposed by this title may be performed by a police justice, but by no other officer, with the same authority, and subject to the same obligations and penalties as apply to the coroner.

See Matter of Ramscar, 63 How. 255; 1 N. Y. Cr. Rep. 83.

§ 790. **Compensation of coroners.**—The coroner is entitled, for his services in holding inquests and performing any other duty incidental thereto, to such compensation as defined by special statutes.

TITLE II.

OF SEARCH WARRANTS.

SECTION 791. Search warrant defined.

792. Upon what grounds it may be issued.

793. It cannot be issued but upon probable cause, supported by affidavit.

794. Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses.

795. Depositions, what to contain.

796. Magistrate, when to issue warrant.

797. Form of the warrant.

SECTION 798. By whom served.

- 799. Officer may break open door or window to execute warrant.
- 800. May break open door or window to liberate person acting in his aid, or for his own liberation.
- 801. When warrant may be served in the night-time, and direction therefor.
- 802. Within what time warrant must be executed and returned
- 803. Officer to give receipt for property taken.
- 804. Property, when delivered to magistrate; how disposed of.
- 805. Return of warrant, and delivery to magistrate of inventory of property taken.
- 806. Magistrate to deliver copy of inventory to the person from whose possession property is taken and to applicant for warrant.
- 807. If grounds for warrant controverted, magistrate to take testimony.
- 808. Testimony, how taken and authenticated.
- 809. Property, when to be restored to person from whom it was taken.
- 810. Depositions, search warrant, return and inventory, to be returned to court of sessions or city court having jurisdiction of offense.
- 811. Maliciously and without probable cause procuring search warrant, a misdemeanor.
- 812. Peace officer, exceeding his authority.
- 813. Person charged with felony supposed to have a dangerous weapon.

§ 791. Search warrant defined. — A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

See *People v. Noelke*, 29 Hun, 461; 1 N. Y. Cr. Rep. 252; affirmed, id. 495; 93 N. Y. 137.

§ 792. Upon what grounds it may be issued. — It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled; in which case it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the crime, or of any other person in whose possession it may be;

3. When it is in the possession of any person, with the intent to use it as the means of committing a public offense, or in the possession of another, to whom he may have delivered it for the purpose of concealing it, or preventing its being discovered; in which case it may be taken, on the warrant, from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have delivered it.

See *People v. Noelke*, 93 N. Y. 137.

A search warrant issued upon information upon oath that certain goods had been stolen by A. and were concealed in the house of B., commanding the constable to enter the said house in the day-time and search for the goods stolen and bring them with B. or the person in whose custody the goods should be found, before the justice, is a valid process. *Bell v. Clapp*, 10 Johns. 263.

Of the necessity of search warrants in cases of felony. *City Bank v. Bangs*, 2 Edw. 95.

§ 793. It cannot be issued but upon probable cause, supported by affidavit. — A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

U. S. Const. Amendment, 4.

§ 794. Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses. — The magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

See *Bell v. Clapp*, 10 Johns. 263.

§ 795. Depositions, what to contain. — The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

§ 796. Magistrate, when to issue warrant. — If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

§ 797. Form of the warrant.—The warrant must be in substantially the following form:

“County of *Albany* [or as the case may be].

“In the name of the people of the state of New York:

“To any peace officer in the county of *Albany* [or as the case may be]: Proof by affidavit having been this day made before me, by [naming every person whose affidavit has been taken], that [stating the particular grounds of the application, according to section seven hundred and ninety-two, or if the affidavit be not ‘positive that there is probable cause for believing that,’ stating the ground of the application in the same manner].

“You are therefore commanded in the day-time [or ‘at any time of the day or night,’ as the case may be, according to section eight hundred and one], to make immediate search on the person of C. D. [or ‘in the building situated,’ describing it, or any other place to be searched, with reasonable particularity as the case may be], for the following property [describing it with reasonable particularity]: and if you find the same, or any part thereof, to bring it forthwith before me at [stating the place].

Dated at the city of *Albany* [or as the case may be], the day of , eighteen hundred .

“E. F.,

“Justice of the peace of the city [or town],
of [or as the case may be].”

Requisites of a valid search warrant. *Johnson v. Comstock*, 14 Hun, 238.

A search warrant legally and regularly issued and duly executed in the day time is a protection as well to the party on whose oath it was issued, as to the officer who executed it. *Beatty v. Perkins*, 6 Wend. 382.

§ 798. By whom served.—A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution.

See *Bell v. Clapp*, 10 Johns. 263.

§ 799. Officer may break open door or window, to execute warrant.—The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

The officer, in the execution of a search warrant, after a demand and refusal to open the outer or other door of the house, may break it open. *Bell v. Clapp*, 10 Johns. 263.

§ 800. **May break open door or window to liberate person acting in his aid, or for his own liberation.**—He may break open any outer or inner door or window of a building for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

See *Bell v. Clapp*, 10 Johns. 263.

§ 801. **When warrant may be served in the night-time, and direction therefor.**—The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits be positive that the property is on the person or in the place to be searched; in which case he may insert a direction that it be served at any time of the day or night.

§ 802. **Within what time warrant must be executed and returned.**—A search warrant must be executed, and returned to the magistrate by whom it was issued, if issued in the city and county of New York, within five days after its date, and if in any other county, within ten days. After the expiration of those times respectively, the warrant, unless executed, is void.

§ 803. **Officer to give receipt for property taken.**—When the officer takes property under the warrant, he must give a receipt for the property taken [specifying it in detail], to the person from whom it was taken by him, or in whose possession it was found, or, in the absence of any person, he must leave it in the place where he found the property.

§ 804. **Property, when delivered to magistrate how disposed of.**—When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections six hundred and eighty-seven to six hundred and eighty-nine, both inclusive. If it were taken on a warrant issued on the grounds stated in the second and third subdivisions of section seven hundred and ninety-two, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense, in respect to which the property was taken, is triable.

§ 805. Return of warrant, and delivery to magistrate of inventory of property taken.—The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly, or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they be present, verified by the affidavit of the officer, and taken before the magistrate, to the following effect: "I, A. B., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

§ 806. Magistrate to deliver copy of inventory to the person from whose possession property is taken, and to applicant for warrant.—The magistrate must thereupon if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

§ 807. If grounds for warrant controverted, magistrate to take testimony.—If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

§ 808. Testimony, how taken and authenticated.—The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in section two hundred.

§ 809. Property, when to be restored to person from whom it was taken.—If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

§ 810. Depositions, search warrant, return and inventory, to be returned to court of sessions or city court having jurisdiction of offense.—The magistrate must annex together the depositions, the search warrant and return, and the inventory, and return them to the next court of sessions of the county or city court, having power to inquire into the offense in respect to which the search warrant was issued, by the intervention of a grand jury, at or before its opening on the first day.

§ 811. **Maliciously and without probable cause procuring search warrant, a misdemeanor.** — A person who maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

§ 812. **Peace officer, exceeding his authority.** — A peace officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

See Penal Code, § 120.

§ 813. **Person charged with felony supposed to have a dangerous weapon, etc.** — When a person charged with felony is supposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon, or any thing which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order or the order of the court in which the defendant may be tried.

TITLE III.

OF THE OUTLAWRY OF PERSONS CONVICTED OF TREASON.

SECTION 814. When application for outlawry may be made.

815. On what proof to be made.

816. Order that the defendant appear to receive judgment, or be outlawed.

817. Publication of order.

818. Judgment on appearance of defendant, or on his not appearing.

819. Effect of the judgment.

820. Filing judgment roll, and transcripts thereof.

821. Judgment roll, of what to consist.

822. Appeal may be at any time taken, by defendant, from judgment.

823. Appeal, how taken, and proceedings thereon.

824. Effect of reversal.

825. Defendant may be arrested to receive judgment, notwithstanding outlawry.

826. No other proceeding for outlawry in criminal cases allowed.

§ 814. **When application for outlawry may be made.** — When, upon a bench warrant issued for the apprehension of a

person who has pleaded guilty, or against whom a verdict has been rendered upon an indictment for treason, it is duly returned that the defendant cannot be found, the district attorney of the county may apply to the court in which the conviction was had, for judgment of outlawry.

§ 815. On what proof to be made.— The application must be founded upon the return of the bench warrant, and upon proof, by affidavit, that the defendant has escaped, and on diligent search cannot be found within the county.

§ 816. Order that the defendant appear to receive judgment, or be outlawed.— The court, upon being satisfied that the defendant has escaped, and cannot, upon diligent search, be found in the county, must make an order that he appear on the first day of the next term, to receive judgment upon the conviction or be outlawed.

§ 817. Publication of order.— The order must be immediately published, once a week for six successive weeks, in a newspaper published in the county, and in the state paper. The expense of the publication is a county charge.

§ 818. Judgment on appearance of defendant, or on his not appearing.— If the defendant appear, judgment must be rendered against him upon the conviction. If he do not appear, the court, upon proof of the due publication of the order, must render judgment that the defendant be outlawed, and that all his civil rights be forfeited.

§ 819. Effect of the judgment.— The defendant is thereupon deemed civilly dead, and forfeits to the people of this state, during his life-time, and no longer, all freehold estate in real property, of which he was seized in his own right, at the time of committing the treason, or at any time thereafter, and all his personal property.

See Penal Code, § 710.

§ 820. Filing judgment roll, and transcripts thereof.— Upon a judgment of outlawry, the judgment roll must be made up, and filed with the clerk of the county in which the conviction was had, and docketed with the same effect as in a civil

action. A transcript thereof may also be filed and docketed, with the like effect, in any other county.

§ 821. **Judgment roll, of what to consist.** — The judgment roll consists of the several matters prescribed in section four hundred and eighty-five, except the fifth subdivision; to which must be annexed a certified copy of the order to appear for judgment, the affidavits proving its publication, and a certified copy of the judgment of outlawry.

§ 822. **Appeal may be at any time taken by defendant from judgment.** — An appeal may be taken by the defendant, at any time, from a judgment of outlawry.

§ 823. **Appeal, how taken, and proceedings thereon.** — The appeal may be taken in person or by counsel, in the same manner, and the proceedings thereon are the same as upon an appeal from a judgment of conviction on an indictment.

§ 824. **Effect of reversal.** — If the judgment be reversed on appeal, the defendant is restored to his civil rights.

§ 825. **Defendant may be arrested to receive judgment, notwithstanding outlawry.** — Notwithstanding judgment of outlawry against the defendant, he may be arrested at any time thereafter to receive judgment upon the conviction.

§ 826. **No other proceeding for outlawry in criminal cases allowed.** — No other proceeding for the outlawry of the defendant in a criminal action can be had than that provided in this title.

TITLE IV.

OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

CHAPTER I. Fugitives from another state or territory, into this state.

II. Fugitives from this state, into another state or territory.

CHAPTER I.

FUGITIVES FROM ANOTHER STATE OR TERRITORY INTO THIS STATE.

- SECTION 827. To be delivered up by the governor, on demand of the executive authority of the state or territory from which they have fled.
828. Magistrate to issue warrant.
829. Proceedings for arrest and commitment of the person charged.
830. When, and for what time to be committed.
831. His admission to bail.
832. Magistrate to give notice to the district attorney, of the name of the person and the cause of his arrest.
833. District attorney to give notice to executive authority of the state or territory, etc.
834. Person arrested to be discharged, unless surrendered within the time limited.
835. Magistrate to return his proceedings to the next court of sessions; proceedings thereon.

§ 827. To be delivered up by the governor, on demand of the executive authority of the state or territory from which they have fled.—It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant or temporary resident of this state is to be arrested, as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment or information from the authorities of such other state or territory, charging such person with treason, felony or crime in such state or territory), to issue and transmit a warrant for such purpose to the sheriff of the proper county or his under sheriff, or in the cities of this state (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police) to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction shall be competent to make service of or execute the same. The governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and intrusted the execution of the governor's warrant must, within thirty days from its date, unless sooner requested, return the same

and make return to the governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this state, or of any city, county, town or village thereof, must, upon request of the governor, furnish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

2. Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the governor of this state, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the supreme court, of any superior city court, or the presiding judge of a court of sessions, who shall, in open court if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the governor thereon, he or they may have a writ of *habeas corpus* upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said court or a judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the governor, and one of the judges aforesaid or a counselor at law of this state, and such waiver shall be immediately forwarded to the governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against, and mentioned in the requisition, the accompanying papers and the warrant issued by the governor thereon, then the court or judge shall order and direct the officer intrusted with the execution of the said warrant of the governor to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant issued thereon, as the agent or agents upon the part of such state to receive him or them; otherwise to be discharged from custody by the court or judge. If upon such hearing the warrant of the governor shall appear to be defective or improperly executed, it shall be by the court or

judge returned to the governor, together with a statement of the defect or defects, for the purpose of being corrected and returned to the court or judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

3. It shall not be lawful for any person, agent or officer to take any person or persons out of this state, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings afore described, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this state, for the purpose of taking him or sending him to another state, without a requisition first duly had and obtained, and without a warrant duly issued by the governor of this state, served by some officer as in this section provided, and without, except in case of waiver in writing as aforesaid, taking him before a court or judge as aforesaid, unless in pursuance to the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats of undue influence, persuade any citizen, inhabitant or temporary resident of this state to sign the waiver of his right to go before a court or judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction be sentenced to imprisonment in a state prison or penitentiary for the term of one year.

4. Any willful violation of this act by any of the above-named officers shall be deemed a misdemeanor in office.

See generally, 2 N. Y. L. J. 1989; 6 Eng. Rep. 188; 28 id. 83; 87 id. 181; 20 Alb. L. J. 425; 18 id. 166; 7 Am. Law Rec. 718-734; 1 Rob. Prac. 3-48; 1 Bish. Crim. Law, § 135 *et seq.*; 1 Bish. Crim. Proc., § 219 *et seq.*; 7 Abb. Pr. (N. S.) 95-106; 7 Abb. N. C. 43; 57 Am. Dec. 389-400.

As to the distinction between the executive and judicial functions in interstate extradition cases, see 2 Crim. L. Mag. 84.

As to powers of governors of states in interstate extradition, see *Knowlton's Case*, 5 Crim. L. Mag. 250, 257, note.

As to revocation of a governor's warrant, see *Work v. Carrington*, 34 Ohio St. 64; 32 Am. Rep. 345.

The Federal Constitution, art. 4, § 2, subdiv. 2, provides: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of

the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." See, also, United States Revised Statutes, §§ 5270-5280; Gould & Tucker's Notes, 979; *People, ex rel., v. Byrnes*, 88 Hun, 98; 2 N. Y. Cr. Rep. 398; *People, ex rel., v. Donohue*, 84 N. Y. 438.

A state statute providing for the surrender of fugitives from the justice of foreign countries is unconstitutional. *People, ex rel. Barlow, v. Curtis*, 50 N. Y. 321; 10 Am. Rep. 488; affirming 44 How. Pr. 171.

To authorize the surrender of a fugitive from justice, there must be a demand by the executive of the state from which he fled, a copy of the affidavit or indictment charging the offense must be produced, certified by such executive as authentic. *Matter of Solomans*, 1 Abb. Pr. (N. S.) 347.

A requisition from the governor of another state upon the executive of this state is no warrant for the arrest of an alleged fugitive from justice. In the absence of other authority a prisoner so held will be discharged on *habeas corpus*. *Matter of Rutter*, 7 Abb. Pr. (N. S.) 67.

An alleged fugitive from justice, if not demanded in a reasonable time by the executive of the state from which he fled, will be discharged from arrest. *People v. Goodhue*, 2 Johns. Ch. 198; 1 Wheel. Crim. Cas. 427; *Matter of Washburn*, 4 Johns. Ch. 106; 3 Wheeler Cr. Cas. 472.

The fact of "fleeing" lies at the foundation of the right to issue a warrant of extradition. *Matter of Jackson*, 2 Flippen, 183; *State v. Jackson*, 1 L. R. A. 370, note.

Where a crime has been committed in another state, and the party is found in this state, this establishes conclusively that he is a fugitive from justice; the governor has no right to inquire into the truth of the charge, nor to look outside the papers to determine whether or not the person is a fugitive; and on *habeas corpus* the court cannot go behind the warrant. *People v. Pinkerton*, 17 Hun, 199.

A party in arrest on a civil process cannot be surrendered on a governor's warrant as a fugitive from justice until he has satisfied the justice of the state in which he is held. *Matter of Briscoe*, 51 How. Pr. 422. *Contra, Matter of Rosenblatt*, 51 Cal. 285.

A person who has been convicted in a state court, within the jurisdiction of which he had been brought only by extradition proceedings based upon an affidavit which falsely alleged that he had fled from that state, in which state he had in fact never been, will be released on *habeas corpus*. *State v. Jackson*, 1 L. R. A. 370.

So long as a fugitive from the justice of a sister state comes voluntarily into this state from his asylum in Canada, no force or "kidnapping" being resorted to to get him here, the fact that he was induced to cross the Canadian line by falsehood, artifice and fraud will afford no sufficient ground for his discharge from custody under the governor's warrant, issued pursuant to a requisition from the state of which he is a fugitive. *Matter of Brown*, 34 Alb. L. J. 182; 4 N. Y. Cr. Rep. 576; 8 Crim. Law Mag. 313; affirmed, id. 676.

Where one charged with crime in Illinois was brought thither from California on a requisition, held, immaterial that he had been forcibly and illegally brought to California from a foreign country. *Ker v. People*, 110 Ill. 627; 51 Am. Rep. 706; affirmed, 119 U. S. 436; *Matter of Barker*, 13 Am. St. Rep. 17.

The extradition will not be ordered of a person who was not actually present in the state where he is alleged to have committed the crime at the time of the commission thereof, and who has not actually fled from the justice of that state, and who is not found as a fugitive in this state. *Matter of Mitchell*, 4 N. Y. Cr. Rep. 596.

Such presence of the accused in the demanding state at the time of the commission of the alleged offense is a jurisdictional fact which must be proved when his extradition is demanded. *Matter of Mitchell*, 4 N. Y. Cr. Rep. 596.

One who goes into a state and commits a crime and returns home is as much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state. *Matter of Roberts*, 24 Fed. Rep. 132.

When a convict in another state escapes from prison before he has served the full term of his sentence, and flees into this state, he may be returned to the authorities of the state from which he fled, although the term of the sentence has fully expired before his recapture. *Matter of Carter*.

Defendant being extradited from France, held, that he was subject to arrest on civil process before he could return. *Adrianse v. Lagrave*, 59 N. Y. 110; 17 Am. Rep. 311; reversing 47 How. Pr. 385. See, also, 28 Eng. Rep. 34; *Slade v. Joseph*, 5 Daly, 187; *Hackney v. Welch*, 107 Ind. 258; 57 Am. Rep. 101; *Browning v. Adams*, 51 How. Pr. 172.

In *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388; 5 Crim. L. Mag. 714, it was held that in the absence of compact between the states a fugitive extradited for one crime may, after discharge and before he is allowed to return, be arrested and tried for another crime.

In *State v. Hall*, 40 Kans. 338; 10 Am. St. Rep. 200, the court say: "A fugitive from justice can be obtained from another state or country only with the consent of the executive authorities of such other state or country; and for a state to procure a fugitive from justice from some other state or country to be tried for some particular offense, by the consent of such other state or country, and then to try him for another and a different offense before he has had an opportunity to return, would be such an unwarranted abuse of judicial process, such a fraud upon justice, such an act of perfidy, that no court in any country should for a moment tolerate the same. The foregoing rule of law applies in criminal cases where the fugitive from justice has been extradited from a foreign country. *U. S. v. Rauscher*, 119 U. S. 407; *U. S. v. Watts*, 8 Sawyer, 370; *Ex parte Hibbs*, 26 Fed. Rep. 421, 431; *Ex parte Coy*, 32 id. 911 and note; *Com. v. Hawes*, 13 Bush, 697; *State v. Vanderpool*, 39 Ohio St. 273; 48 Am. Rep. 431; *Blandford v. State*, 10 Tex. Ct. App. 637. In the cases above cited the fugitives from justice were extradited under treaties, but in these treaties there was no provision that the fugitive from justice should be tried only for the offense for which he was extradited; hence the foregoing decisions are perfectly applicable to this case. The foregoing rule of law also applies in criminal cases between states. *State v. Simmons*, 39 Kans. 262; *In re Cannon*, 47 Mich. 481. And it applies as strongly between states as it does between foreign countries." See *Compton v. Wilder*, 40 Ohio St. 130.

In *Matter of Hope*, 7 N. Y. Cr. Rep. 406, it was held that where a person has been extradited from another state to this state to answer a charge of crime against him, and has then served out a term of imprisonment here, upon his release he cannot be extradited to a third state to serve out an unexpired term of imprisonment in that state. He has, in such case, the right to a reasonable time to return, if he chooses, to the state from which he was extradited.

In *Matter of Reinitz*, 39 Fed. Rep. 204; 7 N. Y. Cr. Rep. 74, the prisoner had been brought from Ireland to this country, tried and acquitted. He was arrested immediately, in an action of debt, but was released, at once, by the U. S. circuit court of this district, and given a reasonable time to return to Ireland, from whence he came.

A person brought to this state from the state of New Jersey, under proper authority, for the purpose of procuring his extradition from this country to a foreign country under a treaty between the two governments, upon a charge of embezzlement, and it appearing on the preliminary hearing that such charges cannot be sustained, must, upon being discharged, be allowed a reasonable time to return to the place whence he was brought; and an arrest in a civil suit before the lapse of such reasonable time will be ineffective to hold the prisoner, who must, under such circumstances, be discharged and allowed a reasonable time to depart from the state. *Matter of Baruch*, 24 Abb. N. C. 109.

The recitals in a warrant of the governor of this state for the arrest of a fugitive from the justice of another state are to be taken at least *prima facie* as true. *People, ex rel., v. Pinkerton*, 77 N. Y. 245.

As to whether the warrant is conclusive or may be met by evidence on the part of the prisoner showing that the papers presented to the governor were in fact defective, *quære*. *People, ex rel., v. Pinkerton*, 77 N. Y. 245.

Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires. *People, ex rel., v. Donohue*, 84 N. Y. 438.

§ 828. Magistrate to issue warrant.—A magistrate may issue a warrant as a preliminary proceeding to the issuing of a requisition by the governor of another state or territory upon the governor of this state for the apprehension of a person charged with treason, felony or other crime, who shall flee from justice and be found within this state.

§ 829. Proceedings for arrest and commitment to the person charged.—The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this Code, for the arrest and commitment of a person charged with a public offense committed in this state; except, that an exemplified copy of an indictment found, or other judicial

proceedings had against him, in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

The affidavit for the arrest of a fugitive from justice must state positively that the crime was committed within the state from which he fled; and that he is actually a fugitive from that state. *Ex parte Hayward*, 1 Sandf. 701; 1 Code Rep. 45; *Ex parte Leland*, 7 Abb. Pr. (N. S.) 64; *People v. Brady*, 56 N. Y. 182.

Where a fugitive from justice is brought up on *habeas corpus*, the court will not inquire into his probable guilt, but only as to the legality of the process and the regularity of the commitment. *Ex parte Clark*, 9 Wend. 212; *People v. Brady*, 56 N. Y. 182; *People v. Pinkerton*, 17 Hun, 199.

When the demand for the surrender of a fugitive from justice is supported by affidavit, no less degree of certainty is admissible than is required to an indictment for the same offense. *People v. Brady*, 56 N. Y. 182.

An affidavit stating that the prisoner is charged with the crime of forgery in another state is not sufficient for his detention. *Ex parte Leland*, 7 Abb. Pr. (N. S.) 64. See *Ex parte Solomans*, 1 id. 347.

§ 830. When and for what time to be committed.—

If from the examination under such warrant, it appears probable that the person charged has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county, for a time specified in the warrant, to enable an arrest of the fugitive to be made under the warrant of the governor of this state, which commitment shall not exceed thirty days exclusive of the day of arrest, on the requisition of the executive authority of the state or territory in which he is charged to have committed the offense, unless he give bail, as provided in the next section, or until he be legally discharged.

An alleged fugitive from justice, if not demanded in a reasonable time by the executive of the state from which he fled, will be discharged from arrest. *People v. Goodhue*, 2 Johns. Ch. 198; 1 Wheel. C. C. 427; *Ex parte Washburn*, 4 Johns. Ch. 106.

The evidence to detain a fugitive for the purpose of surrender must be such as would be sufficient to commit him for trial had the crime been perpetrated in the state to which he fled. *Ex parte Washburn*, 4 Johns. Ch. 106; 3 Wheel. Cr. Cas. 473. See, also, 17 Am. L. Rev. 340.

§ 831. His admission to bail.—Any judge of any court named in section eight hundred and twenty-seven may, in his discretion, admit the person arrested to bail, by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, which

must not be later than the expiration of thirty days from the date of arrest exclusive of such date, and for his surrender to be arrested upon the warrant of the governor of this state.

§ 832. **Magistrate to give notice to the district attorney of the name of the person and the cause of his arrest.**—Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney of the county of the name of the person and the cause of his arrest.

§ 833. **District attorney to give notice to executive authority of the state or territory, etc.**—The district, attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge, of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

§ 834. **Persons arrested to be discharged, unless surrendered within the time limited.**—The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the governor of this state.

§ 835. Repealed, Laws 1886, chap. 638.

CHAPTER II.

FUGITIVES FROM THIS STATE, INTO ANOTHER STATE OR TERRITORY.

§§ 836, 837. Repealed, Laws 1882, chap. 860.

TITLE V.

OF PROCEEDINGS RESPECTING BASTARDY.

CHAPTER I. Proceedings before magistrates, respecting bastards.

II. Appeals from the orders of magistrates, respecting bastards.

III. Enforcement of the undertaking for the support of the bastard or its mother, or for appearance on appeal.

CHAPTER I.

PROCEEDINGS BEFORE MAGISTRATE RESPECTING BASTARDS.

SECTION 838. Definition of a bastard.

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854. Proceedings by magistrate, when security is given by defendant on arrest out of the county.

855. Examination in such case, and order thereon.

856. Magistrates may compel mother to disclose the father of the bastard; proceedings, if she refuse.

857. If mother possess property, two magistrates may make an order that she pay for the support of the child.

858. If she do not comply, she must be committed, or discharged on undertaking.

859. Magistrates may reduce amount directed to be paid by the father or mother; court of sessions may reduce or increase it.

860. Proceedings against the father or mother absconding from their place of residence.

§ 838. Definition of a bastard. — A bastard is a child who is begotten and born,

1. Out of lawful matrimony;

2. While the husband of its mother was separate from her for a whole year previous to its birth; or,

2. During the separation of its mother from her husband pursuant to a judgment of a competent court.

See *People v. Court of Sessions*, 45 Hun, 58.

As to the unrepealed provisions of the Revised Statutes on this subject, see 1 Birdseye's Stat. 246.

The presumption in favor of legitimacy is exceedingly strong. *Fox v. Burke*, 31 Minn. 319. See, also, 2 Whart. Ev. (3d ed.), § 1298; 1 Broom & Had. Com. (Wait's ed.) 884.

As to proof of illegitimacy of a child born of a married woman while her husband is within such a distance as afforded an opportunity for intercourse, see 1 Greenl. Ev., §§ 28, 344; Best Ev. (5th Eng. ed.) 464; 1 Taylor Ev. (7th ed.), §§ 16, 106.

Proof of non-access of the husband destroys the presumption of legitimacy of a child of a married woman. *State v. McDowell*, 101 N. C. 734.

To bastardize and disinherit a child born in lawful wedlock the most clear and conclusive evidence of non-access of the husband is required. Declarations of the husband are insufficient. *Watts v. Owens*, 62 Wis. 512.

The illegitimacy of a married woman's child may be established by proof of the continued absence of her husband. *Pittsford v. Chittenden*, 58 Vt. 49.

The mother of an alleged bastard, who is a married woman, and whose husband was living at the time of the alleged intercourse and the birth of the child, is from necessity a competent witness to prove the illicit intercourse and who is in fact the father of the child. *People v. Overseers*, 15 Barb. 286; *Chamberlain v. People*, 23 N. Y. 90; *Ratchiff v. Wales*, 1 Hill, 63; *Babcock v. Booth*, 2 id. 186.

But she is not competent as a witness to establish the non-access of her husband; nor his absence from the state; nor any fact which may be proved by other testimony. *People v. Overseers*, 15 Barb. 286; *People v. Court of Sessions*, 45 Hun, 54; *Chamberlain v. People*, 23 N. Y. 90; *Egbert v. Greenwalt*, 44 Mich. 245; 38 Am. Rep. 260.

In *People, ex rel. Fuller, v. Carney*, 29 Hun, 47, upon the trial of proceedings to have the defendant adjudged the father of a bastard child, the district attorney was allowed, against the defendant's objection and exception, to ask the mother, who was being examined as a witness, to look at the child and tell what the color of its eyes was. *Held*, error. The court said: "We do not regard this kind of evidence as safe or proper. In the case of *Petrie v. Howe*, 4 Th. & C. 85, the question was as to the color of the child's hair. It was held in that case that such evidence was calculated to, and probably did, prejudice the defendant; that it was improper, and a new trial was granted. The argument used in that case in reference to the color of the hair applies with equal force in this case as to the color of the eyes. Common observation reminds us that in families of children, different colors of hair and eyes are common and that it would be dangerous doctrine to permit a child's paternity to be questioned or proved by the comparings of the color of its hair or eyes with that of the alleged parent." See, also, 22 Eng. Rep. 286; *Hanawalt v. State*, 64

Wis. 84; 54 Am. Rep. 588; *Robnett v. People*, 16 Bradw. 299; *State v. Smith*, 54 Iowa, 104; 37 Am. Rep. 192; *State v. Danforth*, 48 Iowa, 43; 30 Am. Rep. 387; *Clark v. Bradstreet*, 80 Me. 454; 6 Am. St. Rep. 221, note.

§ 839. **Who are liable for its support.** — The father and mother of a bastard are liable for its support. In case of their neglect or inability, it must be supported by the county, city or town in which it is born, as provided by special statutes.

See § 857, *post*.

The mother of a bastard has the right to its control and custody as against the putative father, and is bound to maintain it as its natural guardian. *Matter of Doyle*, Clarke's Ch. (Moak's Notes) 154; *Robalina v. Armstrong*, 15 Barb. 247; *People v. Kling*, 6 id. 366; *The Queen v. Nash*, 10 Q. B. Div. 454; 37 Eng. Rep. 448; *Bustamento v. Analla*, 1 New Mex. 255.

An undertaking upon the part of the putative father of an illegitimate child, to pay to the mother a sum of money for the support of the child, is not illegal; and the obligation may be taken by the mother, payable to herself in her own right, or for the benefit of the child. *Hook v. Pratt*, 78 N. Y. 371; 34 Am. Rep. 539; *Moncrief v. Ely*, 19 Wend. 405; *Birdsall v. Edgerton*, 25 id. 619; *Hicks v. Gregory*, 8 C. B. 378; *Smith v. Roche*, 6 C. B. (N. S.) 223; *Nichole v. Allen*, 3 C. & P. 86; *Jennings v. Brown*, 9 M. & W. 496; *Knowlman v. Bluett*, L. R., 9 Exch. 1, 307; *Bunn v. Winthrop*, 1 Johns. Ch. 337, 338; *Davis v. Herrington* (Ark.), 13 S. W. Rep. 215. *Contra*, *Nine v. Star*, 8 Or. 49; *Mercer v. Mercer*, 37 Alb. L. J. 367.

Infancy of the father is no defense. *People v. Moores*, 4 Den. 518.

An illegitimate child was supported by the relatives of the mother, at the request of the father, and upon his promise that they should be paid, and that if the child survived him he would provide for her by will sufficiently to enable her to pay therefor. He died before the child, but made no such provision. After coming of age the child promised to repay the expenditures. *Held*, that an action lay against the father's estate to recover therefor, and that such action could be maintained by the child. *Todd v. Weber*, 95 N. Y. 181; 49 Am. Rep. 20.

The natural father of an illegitimate child cannot be held for its support if the mother, during the pregnancy, marries another man who has full knowledge of her pregnancy. *Miller v. Anderson*, 43 Ohio St. 473; 54 Am. Rep. 823.

In *Rheel v. Hicks*, 25 N. Y. 289, the plaintiff, having been arrested upon a charge of being the putative father of a bastard, compromised under the act of 1832, chapter 26, upon the payment of \$50. It turned out that the woman was not pregnant. *Held*, that plaintiff was entitled to recover the \$50. Had defendant paid over the money to the county, it would have been no defense.

§ 840. **When bastard, chargeable to the public, is born, or is likely to be born, application to be made to a justice of the peace or police justice.**—If a woman be delivered of a bastard, or be pregnant of a child likely to be born such, and

which is chargeable to a county, city or town, a superintendent of the poor of the county, or an overseer of the poor or other officer of the alms-house of the town or city where the woman is, must apply to a justice of the peace or police justice in the county to inquire into the facts of the case.

A justice can only act in his county, and on proper official application. *Sprague v. Eccleston*, 1 Lans. 74; *Wallsworth v. McCullough*, 10 Johns. 98; *Birdsall v. Edgerton*, 25 Wend. 619.

An overseer of the poor in bastardy proceedings is a "party" in such sense that the proceedings are void if there is affinity between him and the justice. *Risenburgh v. Henness*, 4 Lans. 208.

The justice has no authority to make the preliminary examination or issue a warrant to arrest the putative father on his own motion; a regular application, as required by statute, is necessary. *Sprague v. Eccleston*, 1 Lans. 74.

§ 841. **Examination by the magistrate and warrant against the father.** — The magistrate must, by the examination of the woman on oath, and any other testimony which may be offered, ascertain the father of the bastard, and must issue his warrant, directed to a peace officer of the county, commanding him, without delay, to apprehend the father and bring him before the justice, for the purpose of having an adjudication as to the filiation of the bastard.

See cases cited under § 838, *ante*.

§ 842. **Justice designated as a magistrate, and person proceeded against as defendant.** — An officer issuing a warrant or making an examination, as provided in this chapter, is designated as a magistrate, and the person against whom the warrant is issued as the defendant.

See *Matter of McGrory*, 43 Hun, 441.

§ 843. **Warrant, when to be served in another county.**
If the defendant reside in another county than that in which the warrant issued, the magistrate must, by an indorsement thereon, direct the sum in which the defendant shall give security, and the officer must deliver the warrant to a justice of the peace or police justice in the city or town in which the defendant resides or is found. The magistrate to whom it is presented, on proof, under oath, of the signature of the magistrate who issued the warrant, must then indorse a direction thereon, that it be served in the county in which he resides, and the defendant may be arrested in that county accordingly. Upon this proof, the magis-

trate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterward appear that the warrant was illegally or improperly issued.

See 28 Alb. L. J. 160.

§ 844. **Magistrate in another county may take undertaking for support of bastard and mother, or for appearance of defendant at the sessions.** — When the defendant is arrested in another county, he must be taken before the magistrate who indorsed the warrant, or before another magistrate of the same city or county, who may take from the defendant an undertaking, with sufficient sureties, to the effect :

1. That he will indemnify the county, and town or city, where the bastard was or is likely to be born, and every other county, town or city, against any expense for the support of the bastard, or of its mother during her confinement and recovery, and to pay the costs of arresting the defendant, and of any order of filiation that may be made, or that the sureties will pay the sum indorsed on the warrant ; or

2. That the defendant will appear and answer the charge at the next court of sessions of the county where the warrant was issued, and obey its order thereon.

The bond must be for either the one or the other of the two conditions, but not for both ; if it contain both conditions, that the obligor should appear and that he should indemnify, it is a nullity. *Hoogland v. Hudson*, 8 How. Pr. 343.

If the bond literally follow the statute, it is valid, however superfluous the provisions may be. *People v. Mitchell*, 4 Sandf. 466.

An attorney cannot be surety. Rule 5, Supreme Court. See *People v. Tilton*, 13 Wend. 597.

§ 845. **On giving undertaking, defendant to be discharged.** — When either of the undertakings mentioned in the last section is given, the magistrate must discharge the defendant, and must indorse a certificate of the discharge upon the warrant. He must also deliver the warrant, with the undertaking, to the officer, who must return it to the magistrate granting the warrant, by whom the same proceedings must be had, as if he had taken the undertaking.

§ 846. **If undertaking not given, defendant to be taken before magistrate who issued the warrant.** — If the defendant do not give security, as provided in section eight hundred and

forty-four the officer must take him before the magistrate who issued the warrant.

§ 847. Before what magistrate in the same county, defendant is to be taken, when the magistrate issuing the warrant is unable to act.—If, however, the magistrate who issued the warrant be absent or unable to act, the defendant must be taken before the nearest or most accessible magistrate in the same county. The officer must, at the same time, deliver to the magistrate the warrant, with his return indorsed and subscribed by him.

§ 848. The magistrate to associate with himself another magistrate, and they to examine the matter.—The magistrate before whom the defendant is brought, as provided in the last two sections, must immediately associate with himself another justice of the peace or police justice in the same county or city; and the two magistrates thus associated, must inquire into the charge, and must examine on oath, the woman who is the mother of or pregnant with the bastard in the presence of the defendant, in respect to the charge, and hear any testimony which may be offered in relation thereto.

If the justice first called in does not appear, on an adjourned day, another may be substituted by the written stipulation of the parties entered in the minutes. *People, ex rel., v. Barnett*, 3 Abb. N. C. 510.

An order of filiation made by one magistrate acting alone, although also signed by another, is void. *People, ex rel., v. Dando*, 20 Abb. N. C. 245.

In an action on such an undertaking, it is error to exclude evidence that the order in pursuance of which it was given was void, for want of jurisdiction by reason of the absence of one of the magistrates who should have taken part in the proceedings. *People, ex rel., v. Dando*, 20 Abb. N. C. 245. The court say: "It was perfectly proper for the defendant to contradict the record for the purpose of proving that the court was without jurisdiction. *People v. Cassels*, 5 Hill, 164; *Ferguson v. Crawford*, 70 N. Y. 253; *Craig v. Town of Andes*, 93 id. 405; *Hard v. Shipman*, 6 Barb. 621-624; *Harrington v. People*, 6 id. 607."

§ 849. Adjournment of examination; security from defendant.—The magistrates may, on the application of the defendant, for good cause, adjourn the examination, not exceeding thirty days, upon the defendant giving an undertaking, with two sufficient sureties, to the effect that he will appear before the magistrates at the time appointed, or that the sureties will pay the sum mentioned therein, which must be fixed by the magistrates,

and which must be a full indemnity for the expense of supporting the bastard and its mother, as provided in section eight hundred and fifty-one.

See *People, ex rel., v. Dando*, 20 Abb. N. C. 248; *People v. Boardman*, 24 How. Pr. 512; *People v. Jayne*, 27 Barb. 58.

The sureties on a bond given for the appearance of a defendant in a bastardy proceeding, that he would personally appear before the justices at the time and place to which the proceeding was adjourned, and not depart from thence without the leave of the justices, are not discharged from liability by adjournments of the proceeding after the same is commenced on the adjourned day. *People v. Milham*, 4 N. Y. Cr. Rep. 127; 100 N. Y. 273.

§ 850. **Determination of the case, and order of the magistrates.** — Upon the hearing the magistrates must determine who is the father of the bastard, and must proceed as follows :

1. If they determine that the defendant is not the father of the bastard, he must be forthwith discharged ;

2. If they determine that he is the father, they must make an order of filiation, specifying therein the sum to be paid weekly or otherwise by the defendant, for the support of the bastard ; and if the mother be indigent, the sum to be paid by the defendant for her support, during her confinement and recovery ;

3. They must certify the reasonable costs of arresting the defendant, and of the order of filiation ;

4. They must reduce their proceedings to writing, and subscribe them.

Adjudication in favor of the defendant is a bar to any new proceeding against him for the same offense. *Thayer v. Overseers*, 5 Hill, 443; 5 Den. 98; *People v. Tompkins*, Gen. Sess., 19 Wend. 154; *Dunham v. Monell*, H. & D. Supp. 377.

An order of acquittal is not appealable. *People v. Tompkins*, 19 Wend. 154; *Thayer v. Overseers of Hamilton*, 5 Hill, 443.

No order of filiation is necessary where the putative father elects to give the bond; he thereby admits his liability. *People v. Heine*, 5 N. Y. Leg. Obs. 381.

An order of filiation adjudging the bastard chargeable, and fixing the allowance to be paid by the putative father is conclusive on him till reversed, and the onus is on him to show a legal discharge from the obligation. *Overseers of Hebron v. Ely*, Hill & Den. Supp. 379.

After an order of filiation an infant is bound by law to support his illegitimate child, and his bond is binding upon him notwithstanding his infancy. *People v. Moores*, 4 Den. 518.

Where a defendant has been held on a trial before two justices of the peace by an order of filiation, and on appeal to the court of sessions such order has been vacated, and the defendant held for a trial on the merits on which he is held not to be the father of the child, the costs are to be governed by section 8073 of the Code of Civil Procedure. *Mayham v. Allen*, 50 Hun, 343.

§ 851. Defendant to pay the costs, and give undertaking for support of bastard and mother, or for appearance at sessions. — If the defendant be adjudged to be the father, he must immediately pay the amount certified for the costs of the arrest and of the order of filiation, and enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect,

1. That he will pay weekly or otherwise, as may have been ordered, the sum directed for the support of the child, and of the mother during her confinement and recovery, or which may be ordered by the court of sessions of the county; and that he will indemnify the county, and town or city where the bastard was or may be born [as the case may be], and every other county, town or city, which may have been or may be put to expense for the support of the bastard, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the magistrates; or,

2. That he will appear at the next court of sessions of the county, to answer the charge and obey its order thereon, or that the sureties will pay a sum equal to a full indemnity for supporting the bastard and its mother, as provided in the first subdivision of section eight hundred and forty-four.

See *Tillotson v. Martin*, 40 Hun, 320; *People, ex rel., v. Dando*, 20 Abb. N. C. 248.

Where the bond on appeal does not conform to the provisions of the section it is inoperative, and the court of sessions should dismiss the appeal. *People, ex rel. Downs, v. Lindsay*, 58 Hun, 234; 25 State Rep. 520.

A court of sessions has no power to allow an amendment on a bond given on appeal by a defendant from an order of filiation. *Ramsey v. Childs*, 34 Hun, 329.

A bond conditioned that the father will indemnify the county or appear at the sessions is valid; though it ought to have embraced but one of the alternatives. *People v. Tilton*, 13 Wend. 597.

If a bond require more than is required by statute it will be void. *People v. Meighan*, 1 Hill, 298; *People v. Mitchell*, 4 Sandf. 466.

A bond for both conditions held void, *e. g.*, for appearance and indemnity. *Hoogland v. Hudson*, 8 How. Pr. 343. See, also, *People v. Mitchell*, 4 Sandf. 466; *People v. Moores*, 4 Den. 518; *People v. Stowell*, 2 id. 127.

§ 852. On giving undertaking defendant to be discharged, otherwise to be committed. — Upon a compliance with the provisions of the last section, the magistrates must

discharge the defendant; but otherwise, they or either of them must, by warrant, commit him to the county jail, or in the city of New York, to the city prison of that city, until he be discharged by the court of sessions of the county, or deliver an undertaking, as prescribed by the last section.

§ 853. Commitment of defendant during examination. During the examination, and until the defendant is discharged by the magistrate, he must remain in the custody of the officer who arrested him, unless an undertaking have been given for his appearance, as provided in sections eight hundred and forty-four and eight hundred and forty-nine; and when committed to prison he must be actually confined therein.

§ 854. Proceedings by magistrate when security is given by defendant on arrest out of the county. — When security taken out of the county, for the appearance of the defendant at the court of sessions, as provided in section eight hundred and forty-four, is returned to the magistrate who issued the warrant, he must associate with himself another magistrate of the same county, and the magistrates thus associated must proceed as provided in sections eight hundred and forty-eight to eight hundred and fifty, both inclusive.

§ 855. Examination in such case, and order thereon. — The examination may be had and the order of affiliation made in the absence of the defendant, unless, before the order is made, he require of the magistrate issuing the warrant that the examination be had in his presence, in which case the examination must be had as if the defendant had originally appeared.

§ 856. Magistrates may compel mother to disclose the father of the bastard; proceedings if she refuse. — In making an examination authorized by this chapter, the magistrate issuing the warrant, or the magistrates making the examination, may compel the mother of a bastard, chargeable to a county, city or town, or a woman pregnant of a child likely to be born such, to disclose the name of the father of the bastard; or if she refuse to do so, may, by a warrant setting forth the cause thereof, at the expiration of one month from her delivery, if sufficiently recovered, commit her to the county jail, or, in the city of New York, to the city prison of that city, until she disclose the name of the father.

See § 838, and cases cited.

In *People v. McCoy*, 45 How. Pr. 216, it was held that the forcible examination under an order of the coroner of a female prisoner by physicians for the purpose of obtaining evidence that she had been pregnant and had been delivered of a bastard within two or three weeks previous was in violation of the Constitution which declares that "no person shall be compelled in any criminal case to be a witness against himself."

If the mother refuse to affiliate the child she may be committed. *Scott v. Ely*, 4 Wend. 555.

§ 857. If mother possess property, two magistrates may make an order that she pay for the support of the child.— If the mother of a bastard, chargeable, or likely to become chargeable, as provided in section eight hundred and forty, be possessed of property in her own right, any two magistrates of the county or city where she is, on the application of any of the officers mentioned in that section, must examine into the matter, and may make an order charging the mother with the payment of money weekly, or otherwise, for the support of the bastard.

See § 839, *ante*.

The mother's ability to support the child does not relieve the father of his liability. *People v. Corbett*, 8 Wend. 520; *People v. Haddock*, 12 id. 475.

§ 858. If she do not comply, she must be committed, or discharged on undertaking.— If, after service of the order upon the mother, she do not comply therewith, she must be committed to the county jail, or in the city of New York, to the city prison of that city, until she comply, or enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect that she will appear at the next court of sessions of the county, to answer the matters stated in the order, and obey its order thereon, or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrates.

§ 859. Magistrates may reduce amount directed to be paid by the father or mother; court of sessions may reduce or increase it.— The magistrates, who have made an order against the father or mother of a bastard, as provided in sections eight hundred and fifty and eight hundred and fifty-seven, may, from time to time, for good cause, reduce the amount therein directed to be paid, and upon the application of any of the officers mentioned in section eight hundred and forty, the court of sessions of the county, upon ten days' notice to those

officers or to the father and mother of the bastard, may reduce or increase the amount so directed to be paid.

See *People, ex rel., v. Dando*, 20 Abb. N. C. 248.

§ 860. **Proceedings against the father or mother absconding from their place of residence.** — If the father or mother of a bastard or of a child likely to be born such, abscond from their place of residence, leaving the bastard chargeable, or likely to become chargeable to the public, a superintendent of the poor of the county, or an overseer of the poor or other officer of the almshouse of the town or city where the bastard was born, or is likely to be born, may apply to any two magistrates of the city or county where any property, real or personal, of the father or mother may be, for authority to take the same. Upon due proof of the facts on oath, to the satisfaction of the magistrates, they must issue their warrant, and proceed thereon in the manner provided in title eight of this part, in relation to persons absconding and leaving their children chargeable to the public.

CHAPTER II.

APPEALS FROM THE ORDERS OF MAGISTRATES, RESPECTING BASTARDS.

SECTION 861. Who may appeal, and in what cases.

862. Appeal, how taken.

863. Papers to be transmitted by magistrate, to court of sessions.

864. Court to hear the case ; evidence on hearing.

865. Court may affirm, vacate or modify the order, or adjourn the hearing till the bastard be born.

866. If woman be not pregnant, or be married before her delivery, or the child be not born alive, defendant to be discharged.

867. Order of the court, on affirmance.

868. Commitment of defendant, if he fail to give undertaking.

869. Undertaking for appearance on appeal, when forfeited.

870. When mother bound to appear at the sessions, court to proceed as upon an appeal.

871. When the court may make an order against the mother, for the support of the bastard.

872. Proceedings against the mother, on affirmance or modification of the order of the magistrates.

873, 874. Costs on appeal, when awarded and how paid.

SECTION 875. When order of filiation vacated, except on the merits, court may make a new order of filiation, or bind the defendant to appear.

876. If order of filiation be vacated, except on the merits, magistrates may proceed anew.

877. Court to inquire into circumstances of father or mother, committed for not giving undertaking to support bastard.

878. Father or mother unable to support the bastard, may be discharged.

879. Notice, before discharge, and examination of the matter.

880. Party cannot be discharged, but by the court.

§ 861. Who may appeal, and in what cases.— A person deeming himself aggrieved by the order of two magistrates, made pursuant to the last chapter, may appeal therefrom to the next court of sessions of the county; except that a person who has executed an undertaking to obey an order of filiation, and indemnify the public, as provided in section eight hundred and fifty-one, cannot appeal from any other part of the order mentioned in section eight hundred and fifty, than that which fixes the weekly or other allowance to be paid.

See *People, ex rel., v. Dando*, 20 Abb. N. C. 248; *People, ex rel., v. Court of Sessions*, 45 Hun, 55.

§ 862. Appeal, how taken.— When the father or mother of the bastard has entered into an undertaking for appearance at the next court of sessions of the county, as provided in sections eight hundred and fifty-one and eight hundred and fifty-eight, it is an appeal from the order of filiation or maintenance; and no other notice thereof is necessary. In any other case, the appeal is taken, by a written notice of at least ten days before the court, to the magistrates who made the order, and to the party affected thereby, or to the officer at whose instance it was obtained.

See *People, ex rel., v. Dando*, 20 Abb. N. C. 248; *People, ex rel., v. Lindsay*, 53 Hun, 235.

In bastardy cases an appeal will not lie on an adjudication of general sessions. A review can only be had on *certiorari*. *People, ex rel. Fuller, v. Carney*, 29 Hun, 47.

Writs of error and *certiorari*, in special proceedings of a criminal nature, are not abolished by the Code of Criminal Procedure. It applies only to criminal actions. *People, ex rel. Fuller, v. Carney*, 29 Hun, 47.

§ 863. Papers to be transmitted by magistrates, to court of sessions.— The magistrates receiving an undertaking for appearance at the court of sessions, must transmit it to the

court, before its opening, with a certified copy of the order appealed from.

See *People, ex rel., v. Dando*, 20 Abb. N. C. 248.

§ 864. Court to hear the case ; evidence on hearing.—The court must immediately, or at any other time it may appoint, proceed to hear the allegations and proofs of the parties ; and the party in whose favor the order was made, must support it by evidence. If the mother of the bastard is dead or insane, her testimony on the examination before the magistrate is receivable in evidence.

An order appealed from as above is virtually a suit commenced before two justices and continued before the sessions, but which never reached final determination. *Stowell v. Overseers of Volney*, 5 Den. 98; *Roy v. Torges*, 7 Wend. 358.

§ 865. Court may affirm, vacate or modify the order, or adjourn the hearing till the bastard be born.—The court may affirm or vacate an order of filiation or maintenance, or may reduce or increase the sum ordered to be paid for the support of the bastard or its mother ; and, disregarding defects in form in the order, must amend it according to the fact. If, when the appeal is heard, the bastard be not born, the court may adjourn the hearing until it be born, and in that case, must take an undertaking from the party appealing, for his appearance, in such sum and with such sureties as the court may deem sufficient.

§ 866. If woman be not pregnant, or be married before her delivery, or the child be not born alive, defendant to be discharged.—If the woman alleged to be pregnant, be not so, or be married before her delivery, or the child be not born alive, the defendant must be discharged from custody or from the obligation of his undertaking, either by the court or magistrates, upon that fact being made to appear.

§ 867. Order of the court, on affirmance.—If, upon the hearing of the appeal, the court of sessions affirm an order of filiation or maintenance, it must require the defendant to enter into an undertaking, with sufficient sureties approved by the court, to the effect that he will pay, weekly or otherwise, according to the order as made by the magistrate or modified by the court, the sum directed for the support of the bastard, and of the

mother during her confinement and recovery; and that he will indemnify the county, and town or city where the bastard was or may be born [as the case may be], and every other county, town or city, which may have been put to expense for the support of the child or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court.

§ 868. Commitment of defendant, if he fail to give undertaking. — If, on judgment of affirmance, the defendant do not enter into an undertaking, as provided in the last section, he must be committed to the county jail, or in the city of New York, to the city prison of that city, until he do so, or be discharged by the court.

§ 869. Undertaking for appearance on appeal, when forfeited. — The undertaking for the appearance of the defendant at the court of sessions, upon an appeal, is forfeited by his neglect to appear, or to give the undertaking mentioned in the last two sections, unless he be discharged by the court.

A voluntary departure without leave after appearance forfeits the bond.
People v. Jaynes, 27 Barb. 58.

§ 870. When mother bound to appear at the sessions; court to proceed as upon an appeal. — When the mother of a bastard is bound to appear at the court of sessions, or is committed as provided in section eight hundred and fifty-eight, the court must proceed in respect to the matter in the same manner as upon an appeal.

§ 871. When the court may make an order against the mother, for the support of the bastard. — If the court be satisfied that the mother has property in her own right, sufficient to enable her to support the bastard or contribute to its support, it must confirm the order mentioned in section eight hundred and fifty-seven, or may vary the sum ordered to be paid weekly or otherwise; or if not, it must discharge her from custody or from the obligation of her undertaking.

§ 872. **Proceedings against the mother, on affirmance or modification of the order of the magistrates.**— If the court affirm or modify the order, as provided in the last section, it must require the defendant to enter into an undertaking, with sufficient sureties approved by the court, to the effect that she will pay, weekly or otherwise, according to the order, as made by the magistrates or modified by the court, the sum directed for the support of the bastard, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court. If the undertaking be not given she must be committed in the manner provided in section eight hundred and sixty-eight.

§ 873. **Costs on appeal, when awarded and how paid.**— The court must award costs to the party in whose favor an appeal is determined. When awarded against county superintendents or overseers of the poor of a town, not liable for the support of its own poor, they must be paid by the county treasurer, on delivering to him a certified copy of the order and of the taxed costs, and must be charged by him to the town in the same county, liable to support the bastard, or if there be none, to the county. In the city of New York, when costs are awarded upon an appeal, to the person charged as the father or mother of the bastard, they must, upon the production of similar vouchers, be paid by the comptroller of that city, and charged to the appropriation made to the commissioners of charities and corrections thereof.

Where a defendant has been held on a trial before two justices of the peace by an order of filiation, and, on appeal to the court of sessions, such order has been vacated, and the defendant held for a trial on the merits on which he is held not to be the father of the child, the costs are to be governed by section 8073 of the Code of Civil Procedure, the proceedings being analogous to that on an appeal from a justice's court where a new trial is had in the county court. *Mayham v. Allen*, 50 Hun, 848; 19 State Rep. 812; *Fellows v. Lane*, 67 How. Pr. 485.

§ 874. **Costs on appeal, when awarded and how paid.**— In other cases, the payment of the costs may be enforced by the court, as in a civil action. If the party against whom they are awarded, reside out of the jurisdiction of the court, an action may be brought on the order, by the party entitled to the costs, in which the production of a certified copy of the order and of the taxed costs is conclusive evidence.

§ 875. **When order of filiation vacated, except on the merits, court may make a new order of filiation, or bind the defendant to appear.** — If the court vacate an order of filiation for any other cause than upon the merits, it must proceed, and may make an original order of filiation, in the manner prescribed in the second subdivision of section eight hundred and fifty, or bind the person charged in an undertaking, in a sum and with sureties approved by the court, to appear at the next court of sessions.

§ 876. **If order of filiation be vacated, except on the merits, magistrates may proceed anew.** — If the order be vacated for any other cause than on the merits, and the person charged be bound as provided in the last section, the same proceedings may be had by the magistrate for the apprehension of the defendant, and for making an order of filiation, and for the commitment of the defendant for not giving an undertaking, as are authorized in the first instance. And the same proceedings must be subsequently had in all respects.

§ 877. **Court to inquire into circumstances of father or mother committed for not giving undertaking to support the bastard.** — When a person is committed to prison, charged as the father of a bastard, or of a child likely to be born a bastard, and when the mother of a bastard is so committed for not giving an undertaking to support the bastard, or to indemnify the public, the court must inquire, from time to time, into the circumstances and ability of the father or mother to support the bastard and to procure security therefor.

§ 878. **Father or mother unable to support the bastard may be discharged.** — If the court be at any time satisfied that the father or mother is wholly unable to support the bastard, or to contribute to its support, or to procure security therefor, it may, in its discretion, order the father or mother to be discharged from imprisonment.

§ 879. **Notice before discharge, and examination of the matter.** — Before granting the order the court must be satisfied that reasonable notice has been given to the overseers of the poor, or to the county superintendents or chief officers of the

almshouse, at whose instance the party was committed, of the intention to apply for a discharge, and must hear the allegations and proofs of the superintendents, overseers or officers, and may examine the party applying on oath respecting the subject of the application.

§ 880. **Party cannot be discharged, but by the court.**— A person committed, as provided in section eight hundred and seventy-seven, cannot be discharged from imprisonment, except by the court of sessions of the county.

CHAPTER III.

ENFORCEMENT OF THE UNDERTAKING FOR THE SUPPORT OF THE BASTARD OR ITS MOTHER, OR FOR APPEARANCE ON APPEAL.

SECTION 881. Court to order prosecution of undertaking, when forfeited; by whom prosecuted.

882. In whose name undertaking to be prosecuted.

883. Evidence in the action, and measure of damages

884. For a subsequent breach of the undertaking, new action may be brought.

885. Costs, how recovered, when awarded against the plaintiff.

886. Action may be maintained on the order of the magistrates or court.

§ 881. **Court to order prosecution of undertaking, when forfeited; by whom prosecuted.**— If an undertaking for the appearance at the court of sessions, of a person charged as the father or mother of a bastard, be forfeited, the court may order it to be prosecuted; and the sum mentioned therein may be recovered, and when collected, must, except in the city of New York, be paid to the county treasurer, and by him credited to the town in the same county, liable to the support of the bastard, or if there be none, to the county. In the city of New York, the court must order the undertaking to be prosecuted by the commissioners of charities and corrections, and when collected, it must be paid into the city treasury. In every other county, it must be prosecuted by the district attorney.

See *People, ex rel., v. Dando*, 20 Abb. N. C. 248; *Tillotson v. Martin*, 40 Hun, 822.

§ 882. In whose name undertaking to be prosecuted. —

When an undertaking to obey an order, in relation to the support of a bastard, or of a child likely to be born a bastard, or of its mother, is forfeited, it may be prosecuted in the name of the county superintendents of the county or the overseers of the poor of the town, which was liable for the support of the bastard, or which may have incurred any expense in the support of the bastard, or of its mother, during her confinement and recovery; or in the city of New York, in the name of the corporation of that city.

See *Tillotson v. Martin*, 40 Hun, 321.

The order of affiliation is conclusive unless appealed from. *Wallsworth v. Mead*, 9 Johns. 367; *People v. Relyea*, id. 195; *Rockfellow v. Donnelly*, 8 Cow. 623; *People v. Corbett*, 8 Wend. 520; *Overseers v. Cox*, 7 id. 235.

§ 883. Evidence in the action, and measure of damages. —In the action mentioned in the last section, it is not necessary to prove the actual payment of money by a county superintendent, overseer of the poor, officer of an alms-house, or other person; but the neglect to pay a sum ordered to be paid by competent authority, for the support of the bastard, or of its mother, is a breach of the undertaking, and the measure of the damages is the sum ordered to be paid, and which was withheld at the time of the commencement of the action, with interest thereon.

See *Tillotson v. Martin*, 40 Hun, 321.

In such an action the burden is on the defendant to show himself exonerated from the payment. *Wallsworth v. Mead*, 9 Johns. 367; *Rockfellow v. Donnelly*, 8 Cow. 623; *People v. Corbett*, 8 Wend. 520; *People v. Haddock*, 12 id. 475.

Money may be recovered back if mother not pregnant. *Rheel v. Hicks*, 25 N. Y. 239.

§ 884. For a subsequent breach of the undertaking new action may be brought. —For a breach of the undertaking, after the recovery of damages or the commencement of an action, another action may, in the same manner, be brought. The money collected upon the undertaking must be paid, and credited, in the manner provided in section eight hundred and eighty-one.

See *Tillotson v. Martin*, 40 Hun. 318.

§ 885. **Costs, how recovered, when awarded against the plaintiff.**— If, in the action, costs be awarded against the plaintiffs, they may be recovered, as follows:

1. If against the corporation of the city of New York, in the same manner as in any other action;

2. If against county superintendents or overseers of the poor, they must, upon the delivery of a transcript of the judgment, be paid by the county treasurer, and by him charged to the town in the same county, liable for the support of the bastard, or if there be none, to the county.

Taxable costs to be allowed. *Ontario Co. v. Moore*, 12 Wend. 273; *Washburn v. Overseers*, 9 Johns. 119.

§ 886. **Action may be maintained on the order of the magistrates or court.**— An action may be maintained by the parties authorized by section eight hundred and eighty-two, upon an order made by two magistrates, or by a court of sessions, for the payment of a sum weekly or otherwise, for the support of the bastard or its mother, notwithstanding an undertaking may have been given to comply with the order; and in case of the death of the person against whom the order was made, an action may be maintained thereon against his executors or administrators. But when an undertaking is given to appear at the next court of sessions, no action can be brought on the order until it is affirmed by the court.

TITLE VI.

OF PROCEEDINGS RESPECTING VAGRANTS.

SECTION 887. Who are vagrants.

888. Proceedings before magistrate.

889. Child, how kept.

890. Peace officers, when required by any person, to carry vagrant before a magistrate for examination.

891. Vagrant, when to be convicted; form of certificate of conviction.

892. Certificate to constitute record of conviction, and to be filed; commitment of vagrant.

893. Children begging, how disposed of.

894. Peace officers to arrest and pursue a person disguised, and take him before a magistrate.

SECTION 895. Private citizen may do so, without warrant.

896. Peace officer may require aid; duty of persons required to aid him.

897. Neglect or refusal to aid peace officer, without lawful cause, a misdemeanor; punishment.

898. Magistrate may depute an elector of the county to make arrest of person disguised; if his name be not known, fictitious name may be used.

§ 887. Who are vagrants.—The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment;

2. A person who, being an habitual drunkard, abandons, neglects or refuses to aid in the support of his family;

3. A person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health;

4. A common prostitute who has no lawful employment, whereby to maintain herself;

5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms;

6. A person wandering abroad and lodging in taverns, groceries, ale-houses, watch or station-houses, out-houses, market places, sheds, stables, barns or uninhabited buildings, or in the open air, and not giving a good account of himself;

7. A person, who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure;

8. Any child between the age of five and fourteen, having sufficient bodily health and mental capacity to attend the public school, found wandering in the streets or lanes of any city or incorporated village, a truant, without any lawful occupation.

See *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 58; *Matter of Moses*, 13 Abb. N. C. 190; 1 N. Y. Cr. Rep. 508; *People, ex rel., v. Catholic Protectory*, 101 N. Y. 202; 4 N. Y. Cr. Rep. 85; 3 How. Pr. (N. S.) 350; *State v. Glenn*, 54 Md. 572; *Portland v. Bangor*, 65 Me. 120; 20 Am. Rep. 681; *Matter of Forbes*, 11 Abb. Pr. 52; 19 How. Pr. 457.

§ 888. **Proceedings before magistrate.**— When complaint is made to any magistrate by any citizen or peace officer against any vagrant under subdivision eight of the last section, such magistrate must cause a peace officer to bring such child before him for examination, and shall also cause the parent, guardian or master of such child, if the child has any, to be summoned to attend such examination.

If, thereon, the complaint shall be satisfactorily established, the magistrate must require the parent, guardian or master to enter into an engagement in writing to the corporate authorities of the city or village, that he will restrain such child from so wandering about, will keep him in his own premises or in some lawful occupation, and will cause him to be sent to some school, at least four months in each year, until he become fourteen years old.

The magistrate may, in his discretion, require security for the faithful performance of such engagement.

If the child has no parent, guardian or master, or none can be found, or if the parent, guardian or master refuse or neglect, within a reasonable time, to enter into such engagement, and to give such security if required, the magistrate shall make the like disposition of such child as is authorized to be made by section two hundred and ninety-one of the Penal Code, of children coming within the descriptions therein mentioned. (Amended 1888.)

§ 889. Repealed, 1888, chap. 220, § 5.

§ 890. **Peace officers, when required by any person, to carry vagrant before a magistrate for examination.**— A peace officer must, when required by any person, take a vagrant before a justice of the peace or police justice of the same city, village or town, or before the mayor, recorder, or city judge, or judge of the general sessions of the same city, for the purpose of examination.

See *People, ex rel. Kingsley, v. Pratt*, 22 Hun, 800.

§ 891. **Vagrant, when to be convicted; form of certificate of conviction.**— If the magistrate be satisfied, from the confession of the person so brought before him, or by competent testimony, that he is a vagrant, he must convict him, and must make and sign, with his name of office, a certificate substantially in the following form:

"I certify that A. B., having been brought before me, charged with being a vagrant, I have duly examined the charge, and that upon his own confession in my presence [or 'upon the testimony of C. D.,' etc., naming the witnesses], by which it appears that he is a person [pursuing the description contained in the subdivision of section eight hundred and eighty-seven, which is appropriate to the case], I have adjudged that he is a vagrant.

"Dated at the *town* [or city] of _____, the _____ day of _____, 18 ____.

"E. F.,

"Justice of the peace of the town of _____," [or as the case may be.]

The "confession" means a plea of guilty or some acknowledgment tantamount thereto not an admission deduced by the magistrate argumentatively. *Bennac v. People*, 4 Barb. 164.

§ 892. **Certificate to constitute record of conviction, and to be filed; commitment of vagrants.**—The magistrate must immediately cause the certificate which constitutes the record of conviction to be filed in the office of the clerk of the county, and must, by a warrant signed by him with his name of office, commit the vagrant, if not a notorious offender, and a proper object for such relief, to the county poor-house, if there be one, or to the alms-house or poor-house of the city, village or town, for not exceeding six months at hard labor, or if the vagrant be an improper person to be so committed, he must be committed for a like term to the county jail, or in the city of New York, to the city prison or penitentiary of said city, or in the county of Kings, to the penitentiary of that county. In those counties of the state where the distinction between county poor and town poor is maintained, the expense of the conviction and maintenance during the confinement of any vagrant committed to any one of the places of confinement above specified, who shall at the time of such commitment have obtained a legal settlement in one of the towns of the county in which said persons shall be convicted, shall be a charge upon the town where they may reside at the time of such commitment.

See *Matter of Dorfmann*, 21 Abb. N. C. 297.

The filing of the record of conviction of a prisoner on a charge of being a vagrant by a police justice in the office of the general sessions of the peace is regular. *Matter of Waters*, 66 How. Pr. 173.

The confinement of disorderly persons and vagrants in the Albany county penitentiary is proper and lawful, notwithstanding sections 892 and 893. Laws of 1847, chapter 183, is not repealed by the provisions of these sections. *People v. Coffee*, 62 How. 445. See, also, *People v. Baker*, 10 Abb. N. C. 210.

§ 893. Repealed, 1888, chap 220 § 5.

See *People, ex rel., v. Catholic Protectors*, 101 N. Y. 202; 4 N. Y. Cr. Rep. 85; 3 How. Pr. (N. S.) 350.

§ 894. **Peace officers to arrest and pursue a person disguised, and take him before a magistrate.**—It is the duty of every peace officer of the county, city, village, or town, where a person described in the seventh subdivision of section eight hundred and eighty-seven is found, to arrest and take him before a magistrate mentioned in section eight hundred and eighty-eight, to be proceeded against as a vagrant.

§ 895. **Private citizens may do so without warrant.**—A private citizen of the county may also, without warrant, exercise the powers conferred upon a peace officer by the last section.

§ 896. **Peace officers may require aid; duty of persons required to aid him.**—In the execution of the duties imposed by section eight hundred and ninety-four the peace officer may command the aid of as many male inhabitants of his county, city, village or town as he may think proper; and a citizen so commanded may provide himself, or be provided with, such means and weapons as the officer giving the command may designate.

§ 897. **Neglect or refusal to aid peace officer, without cause, a misdemeanor; punishment.**—A person commanded to aid the officer, as prescribed in the last section, and who without lawful cause refuses or neglects to do so, is guilty of a misdemeanor, and is punishable by a fine not exceeding two hundred and fifty dollars, or by imprisonment not exceeding one year, or both.

§ 898. **Magistrate may depute an elector of the county to make arrest of person disguised; if his name be not known, fictitious name may be used.**—A magistrate to whom complaint is made against a person charged as a vagrant, as described in the seventh subdivision of section eight hundred

and eighty-seven, may, by a warrant signed by him, with his name of office, depute an elector of the county to arrest and bring the vagrant before him to answer the complaint; and if the name of the person complained of be not known, he may be described in the warrant and in all subsequent proceedings thereon, by a fictitious name.

TITLE VII.

OF PROCEEDINGS RESPECTING DISORDERLY PERSONS.

SECTION 899. Who are disorderly persons.

900. On complaint, warrant to be issued.

901. On confession or proof that he is a disorderly person, security to be required.

902. If security given, defendant to be discharged; if not, to be convicted; form of certificate.

903. Certificate, to constitute record of conviction, and to be filed; commitment thereon.

904. Undertaking, when forfeited.

905. How prosecuted, and proceeds how applied.

906. When new security may be required, or defendant committed after recovery on undertaking.

907. Defendant committed for not giving security, how discharged.

908. Keeper of prison, to return list of disorderly persons committed to court of sessions.

909. Examination of the case by the court.

910. Court may discharge, or authorize the binding out of disorderly person.

911. Court may also commit him to prison; nature and duration of imprisonment.

912. Order to procure materials and implements, and to compel him to work.

913. Expense of materials or implements, how paid for, and proceeds of labor, how disposed of.

§ 899. Who are disorderly persons.— The following are disorderly persons :

1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means ;

2. Persons who threaten to run away and leave their wives or children a burden upon the public ;

3. Persons pretending to tell fortunes, or where lost or stolen goods may be found ;

4. Keepers of bawdy houses or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals, or other disorderly persons ;

5. Persons who have no visible profession or calling, by which to maintain themselves, but who do so, for the most part, by gaming ;

6. Jugglers, common showmen and mountebanks, who exhibit or perform for profit, puppet shows, wire or rope dancers or other idle shows, acts or feats ;

7. Persons who keep, in a public highway or place, an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming, therewith ;

8. Persons who play, in a public highway or place, with cards, dice or any other apparatus or device for gaming ;

9. Habitual criminals within the provisions of this Code.

See *Lutes v. Shelly*, 40 Hun, 199; *People v. Grimshaw*, 2 N. Y. Cr. Rep. 396; *People v. Miller*, 38 Hun, 84; *People v. Klock*, 48 id. 277; *Bulkley v. Boyce*, id. 261-2; *People, ex rel., v. Forbes*, 52 id. 32; *People v. Carroll*, 3 Park. 73; *Bennac v. People*, 4 Barb. 164.

Who are gamesters and disorderly persons. *People v. Cutler*, 28 Hun, 465.

- The power of a police justice to require bail in a case of conviction of disorderly conduct, and to commit in default thereof, has not been affected by the Code of Criminal Procedure. *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 58.

A decision of a police justice dismissing a complaint made by a wife against her husband for abandonment under this section is reviewable at general term upon a writ of *certiorari*. *People v. Walsh*, 33 Hun, 345.

The common-law remedy by indictment against a person keeping a bawdy-house was not abolished or superseded by the provision of the Code of Criminal Procedure as to disorderly persons. It is not essential to the validity of a sentence to imprisonment in a county penitentiary under the statute authorizing such imprisonment (Laws of 1874, chap. 209, as amended by Laws of 1876, chap. 158), that it shall state that the prisoner is "to be received, kept and employed in the manner prescribed by law and the rules of the penitentiary." That provision of the statute is no part of the sentence, but is simply directory to the keeper of the penitentiary. *People, ex rel. Van Houton, v. Saddler*, 97 N. Y. 146; 3 N. Y. Cr. Rep. 471.

A decision of a police justice dismissing a complaint made by a wife against her husband for abandonment, under this section, is reviewable at general term upon *certiorari*. The justice acts as an officer and not as a court of special sessions, and his decision cannot be reviewed under section 749 of

the Code of Criminal Procedure. *People v. Walsh*, 33 Hun, 345; 67 How. Pr. 482.

A society organized under chapter 180, Laws of 1875, may prosecute cases arising under this section. The president thereof may prosecute the case, although no formal action has been taken by the society, as such an act is incidental to the execution of the trust reposed in him as the head of the corporate body.

The fact that the child has voluntarily left its home does not absolve the father from his obligation to support and maintain it, nor relieve him from liability under this section for a failure to do so. *People v. Strickland*, 13 Abb. N. C. 478.

§ 900. On complaint, warrant to be issued.— Upon complaint on oath, to a justice of the peace or police justice of a city, village or town, or to the mayor, recorder, city judge or judge of the general sessions of the city, against a person, as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a peace officer to arrest the defendant, and bring him before the magistrate for examination.

See *Potter v. McAlpine*, 3 Dem. 124; *Com'rs of Charities v. Hammill*, 33 Hun, 348; *Bulkley v. Boyce*, 48 id. 261; *People, ex rel. Scherer, v. Walsh*, 2 N. Y. Cr. Rep. 327; *People, ex rel. Lichtenstein, v. Hodgson*, 35 N. Y. State Rep. 982.

§ 901. On confession or proof that he is a disorderly person, security to be required.— If the magistrate be satisfied, from the confession of the defendant, or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, to the following effect :

1. If he be a person described in the first or second subdivision of section eight hundred and ninety-nine, that he will support his wife and children, and will indemnify the county, city, village or town against their becoming, within one year, chargeable upon the public;

2. In all other cases, that he will be of good behavior for the space of one year;

Or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrate.

See *Bulkley v. Boyce*, 48 Hun, 261; *Lutes v. Shelley*, 40 id. 197; *Com'rs v. Hammill*, 33 id. 348; *Potter v. McAlpine*, 3 Dem. 124; *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 58; *People v. Carroll*, 3 Park. 73.

§ 902 **If security given, defendant to be discharged; if not, to be convicted; form of certificate.**—If the undertaking be given, the defendant must be discharged. But if not, the magistrate must convict him as a disorderly person, and must make, and sign with his name of office, a certificate in substantially the following form:

"I certify that A. B., having been brought before me charged with being a disorderly person, I have duly examined the charge, and that upon his own confession in my presence [or 'upon the testimony of C. D.,' etc., naming the witnesses], by which it appears that he is a [pursuing the description contained in the subdivision of section eight hundred and ninety-nine, which is appropriate to the case], I have adjudged that he is a disorderly person.

"Dated at the town [or 'city'] of _____, the _____ day of _____, 18

"E. F.,

"*Justice of the peace of the town of*

"[Or as the case may be.]"

See *Potter v. McAlpine*, 8 Dem. 124; *People, ex rel., v. Saddle*, 97 N. Y. 147; 8 N. Y. Cr. Rep. 473.

§ 903. **Certificate to constitute record of conviction, and to be filed; commitment thereon.**—The magistrate must immediately cause the certificate, which constitutes the record of conviction, to be filed in the office of the clerk of the county, and must, by a warrant signed by him with his name of office, commit the defendant to the county jail, or in the city of New York, to the city prison or penitentiary of that city, or in the county of Kings, to the penitentiary of that county, for not exceeding six months at hard labor, or until he gives the security prescribed in section nine hundred and one.

See *Potter v. McAlpine*, 8 Dem. 124; *People, ex rel., v. Sadler*, 97 N. Y. 147; 8 N. Y. Cr. Rep. 473; *Matter of Nichols*, 81 Daily Reg. 165; *Matter of Trimble*, 62 How. Pr. 61; *Matter of Wachter*, id. 352; *People v. Coffee*, id. 445.

§ 904. **Undertaking, when forfeited.**—The undertaking mentioned in section nine hundred and one is forfeited by the commission of any of the acts which constitute the person by whom it was given a disorderly person, and in the case of a person described in the seventh and eighth subdivisions of section

eight hundred and ninety-nine, by his playing or betting, at one time or sitting, for money or property exceeding the value of two dollars and fifty cents.

See *Potter v. McAlpine*, 8 Dem. 124; *Buckley v. Boyce*, 48 Hun, 262.

§ 905. **How prosecuted, and proceeds how applied.** — When an undertaking is forfeited, it may be prosecuted in the name of the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, in the name of the corporation of that city, and the sum collected in the action must be paid into the county or city treasury, as the case may be, for the benefit of the poor.

See *Lutes v. Shelley*, 40 Hun, 199; *People v. Pettit*, 8 id. 416.

§ 906. **When new security may be required, or defendant committed after recovery on undertaking.** — Upon a recovery on the undertaking, the court in which it is had, may require from the defendant new security in the manner provided in section nine hundred and one, or if he fail to give it, may commit him in the manner provided in section nine hundred and three.

See *Lutes v. Shelley*, 40 Hun, 199.

§ 907. **Defendant committed for not giving security; how discharged.** — A person committed as a disorderly person, on failure to give security, may be discharged by any two justices of the peace or police justices or the county judge of the county, upon giving security as originally required, pursuant to section nine hundred and one.

See *People, ex rel., v. Sadler*, 97 N. Y. 147; 3 N. Y. Cr. Rep. 473.

§ 908. **Keeper of prison, to return list of disorderly persons committed to court of sessions.** — The keeper of every prison to which disorderly persons may be committed, must return to the court of sessions of the county, on the first day of each term, a list of the persons so committed and then in his custody, with the nature of the offense of each, the name of the magistrate by whom he was committed, and the term of his imprisonment.

§ 909. **Examination of the case by the court.** — The court of sessions must thereupon inquire into the circumstances of each case, and hear any proof that may be offered, and must examine the record of conviction, which is evidence of the facts contained in it, until disproved.

§ 910. **Court may discharge, or authorize the binding out of disorderly person.** — The court may discharge a person so committed from imprisonment, either absolutely or upon his giving security as provided in section nine hundred and one, or if he be a minor, may authorize the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, commissioners of charities and corrections, to bind him out in some lawful calling as a servant, apprentice, mariner or otherwise, until he be of age; or if he be of age, to contract for his service with any person, as a laborer, servant, apprentice, mariner or otherwise, for not exceeding one year. The binding out or contract, pursuant to this section, has the same effect as the indenture of an apprentice, with his own consent and that of his parents, and subjects the person bound out or contracted, to the same control of his master and of the court of sessions of the county, as if he were bound as an apprentice.

See *People, ex rel., v. Sadler*, 97 N. Y. 147; 3 N. Y. Cr. Rep. 473.

§ 911. **Court may also commit him to prison; nature and duration of imprisonment.** — The court may also, in its discretion, order a person convicted as a disorderly person, to be kept in the county jail, or in the city of New York, in the city prison or penitentiary of that city, for a term not exceeding six months at hard labor.

§ 912. **Order to procure materials and implements, and to compel him to work.** — If there be no means provided in the prison for employing the offender at hard labor, the court may direct the keeper to furnish him such employment as it may specify, and for that purpose to purchase materials and implements, not exceeding a prescribed value, and to compel the offender to perform the work allotted to him. The expenses incurred in carrying the order into effect must be paid to the keeper by the county treasurer, upon the delivery to him of the order of the court, and an account under the oath of the keeper, of the materials and implements furnished.

§ 913. **Expense of materials or implements, how paid for, and proceeds of labor, how disposed of.** — The keeper must sell the produce of the labor of the offender, and must account for the cost of the materials or implements purchased, and for one-half of the surplus, to the board of supervisors, and pay it into the county treasury, and pay the other half of the surplus to the person by whom it was earned, on his discharge from imprisonment. He must also account to the court, when required, for the materials or implements purchased, and for the disposition of the proceeds of the labor of the offender.

TITLE VIII.

OF PROCEEDINGS RESPECTING THE SUPPORT OF POOR PERSONS.

SECTION 914. Who may be compelled to support poor relatives.

915. Order to compel a person to support a poor relative, by whom and how applied for to court of sessions.

916. Court to hear the case and make order of support.

917. Support, when to be apportioned among different relatives.

918. Order, to prescribe time during which support is to continue, or may be indefinite; when and how order may be varied.

919. Costs, by whom to be paid and how enforced.

920. Action on the order, on failure to comply therewith.

921. Parents leaving their children chargeable to the public, how proceeded against.

922. Seizure of their property; transfer thereof, when void.

923. Warrant and seizure, when confirmed or discharged; direction of the court thereon.

924. Warrant, in what cases to be discharged.

925. Sale of the property seized and application of its proceeds.

926. Powers of superintendents of poor.

§ 914. **Who may be compelled to support poor relatives.**

The father, mother and children, of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepid, so as to be unable by work to maintain himself, must at their own charge, relieve and maintain him in a manner to be approved by the overseers of the town where he is, or in the city of New York, by the commissioners of charities and corrections.

See 64 Am. Dec. 279; Schouler's Dom. Rel., § 237; *Edwards v. Davis*, 16 Johns. 281; *Stone v. Burgess*, 2 Lans. 439; 47 N. Y. 521; *Menden v. Cox*, 7 Cow. 235; *Matter of Hunt*, 5 id. 284; *Stevens v. Cheney*, 36 Hun, 2; *Tillotson v. Smith*, 40 id. 322; *Herendeen v. De Witt*, 49 id. 53.

§ 915. **Order to compel a person to support a poor relative, by whom and how applied for, to court of sessions.** If a relative of a poor person fail to relieve and maintain him, as provided in the last section, the overseers of the poor of the town where he is, or in the city of New York, the commissioners of charities and corrections may apply to the court of sessions of the county where the relative dwells, for an order to compel such relief, upon at least ten days' written notice, served personally, or by leaving it at the last place of residence of the person to whom it is directed, in case of his absence, with a person of suitable age and discretion.

See *Stevens v. Cheney*, 36 Hun, 3; *Anon.*, 3 N. Y. Leg. Obs. 354.

§ 916. **Court to hear the case, and make order of support.**—At the time appointed in the notice, the court must proceed summarily to hear the allegations and proofs of the parties, and must order such of the relatives of the poor person, mentioned in section nine hundred and fourteen, as were served with the notice and are of sufficient ability, to relieve and maintain him, specifying in the order the sum to be paid weekly for his support, and requiring it to be paid by the father, or if there be none, or if he be not of sufficient ability, then by the children, or if there be none, or if they be not of sufficient ability, then by the mother.

§ 917. **Support, when to be apportioned among different relatives.**—If it appear that any such relative is unable wholly to maintain the poor person, but is able to contribute toward his support, the court may direct two or more relatives, of different degrees, to maintain him, prescribing the proportion which each must contribute for that purpose; and if it appear that the relatives are not of sufficient ability wholly to maintain him, but are able to contribute something, the court must direct the sum, in proportion to their ability, which they shall pay weekly for that purpose.

See *Stone v. Burgess*, 2 Lans. 439; 47 N. Y. 521.

§ 918. Order to prescribe time during which support is to continue, or may be indefinite; when and how order may be varied.— The order may specify the time during which the relatives must maintain the poor person, or during which any of the sums directed by the court are to be paid, or it may be indefinite, or until the further order of the court. The court may from time to time vary the order, as circumstances may require, on the application either of any relative affected by it, or of an officer on whose application the order was made, upon ten days' written notice.

§ 919. Costs, by whom to be paid, and how enforced.— The costs and expenses of the application must be ascertained by the court, and paid by the relatives against whom the order is made; and the payment thereof, and obedience to the order of maintenance, and to any order for the payment of money, may be enforced by attachment.

§ 920. Action on the order on failure to comply therewith.— If a relative, required by an order of the court, to relieve or maintain a poor person, neglect to do so in the manner approved by the officers mentioned in section nine hundred and fourteen, and neglect to pay to them weekly the sum prescribed by the court, the officers may maintain an action against the relative, and recover therein the sum prescribed by the court, for every week the order has been disobeyed, to the time of the recovery, with costs, for the use of the poor. In the city of New York, the action must be in the name of the corporation of that city.

See *Concense v. McArthur*, 17 Barb. 410; *Duel v. Lamb*, 1 Th. & C. 86.

§ 921. Parents leaving their children chargeable to the public, how proceeded against.— When the father, or the mother being a widow or living separate from her husband, absconds from the children, or a husband from his wife, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother or husband is situated, for a warrant to seize the same.

Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding. Whenever any child shall be committed to an institution pursuant to any provision of the Penal Code, any magistrate may issue a warrant for the arrest of the father of the child, and examine into his ability to maintain such child in whole or in part; and if satisfied that such father is able to contribute toward the support of the child, then the magistrate shall, by order, require the weekly payment by such father of such sum, and in such manner as such magistrate shall in said order direct, toward the maintenance of such child in such institution, which amount when paid shall be credited by the institution to the city, town, or county against any sums due to it therefrom on account of the maintenance of the child.

See *People v. Overseers*, 23 Barb. 236; *Downing v. Ruger*, 21 Wend. 188.

§ 922. Seizure of their property; transfer thereof when void.—The officers so applying may seize and take the property, wherever it may be found in the same county; and are vested with all the right and title thereto, which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next court of sessions of the county where they reside, there to be filed.

§ 923. Warrant and seizure, when confirmed or discharged; direction of the court thereon.—The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied towards the maintenance of the children or wife of the person absconding.

See *People v. Overseers*, 23 Barb. 236.

§ 924. **Warrant, in what cases to be discharged.** — If the party against whom the warrant issued, return and support the wife or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town, to the overseers of the poor of the town, or in the city of New York, to the commissioners of charities and corrections, that the wife or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

§ 925. **Sale of the property seized and application of its proceeds.** — The officers must sell at public auction the property ordered to be sold, and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statutes. They must also account to the court of sessions of the county, for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time.

§ 926. **Powers of superintendents of poor.** — In those counties where all the poor are a charge upon the county, the superintendents of the poor are vested with the same powers, as are given by this title to the overseers of the poor of a town, in respect to compelling relatives to maintain poor persons, and in respect to the seizure of the property of a parent absconding and abandoning his family; and are entitled to the same remedies in their names, and must perform the duties required by this title, of overseers, and are subject to the same obligations and control.

See *Tillotson v. Smith*, 12 N. Y. State Rep. 332; *Norton v. Rhodes*, 18 Barb. 100.

TITLE IX.

OF PROCEEDINGS RESPECTING MASTERS, APPRENTICES AND SERVANTS.

SECTION 927. Complaint against apprentice or servant for absenting himself or refusing to serve, or for a misdemeanor or ill behavior.

928. Warrant, when complaint is made in the absence of the defendant.

929. Warrant, by whom and how executed.

930. Hearing the complaint, and committing or discharging the defendant.

931. Complaint against the master for cruelty, misuseage or violation of duty.

932. Hearing the complaint, and dismissing it or discharging the apprentice or servant.

933. Preceding sections not applicable to apprentice with whom money is received or agreed for.

934. Complaint against master in such case, and direction thereon.

935. If complaint not compromised, the master to be held to appear at sessions.

936. Proceedings thereon and order of the court.

937. Complaint by master against clerk or apprentice, where money is paid or agreed for; clerk or apprentice, when held to appear at sessions.

938. Proceedings thereon and order of the court.

939, 940. Indenture or contract of service, how assigned on death of master.

§ 927. Complaint against apprentice or servant, for absenting himself, or refusing to serve, or for a misdemeanor or ill behavior. — If an apprentice or servant, lawfully bound to service as prescribed by special statutes, willfully absent himself therefrom, without the leave of his master, or refuse to serve according to his duty, or be guilty of any misdemeanor or ill behavior, his master may make complaint of the facts under oath before a justice of the peace or police justice in the county or before the mayor, recorder or city judge of the city where he resides.

§ 928. Warrant, when complaint is made in the absence of the defendant. — If the complaint be made in the absence of the defendant, and the facts be proved to the satisfaction of the magistrate, he must issue a warrant signed by him, with his name of office, to a peace officer of the county or

city, commanding him to arrest the defendant and bring him before the magistrate forthwith, or at a specified time and place, to answer the complaint.

§ 929. **Warrant, by whom and how executed.**—The peace officer must accordingly execute the warrant by arresting the defendant and taking him before the magistrate.

§ 930. **Hearing the complaint, and committing or discharging the defendant.**—The magistrate must immediately, or at a time to which he may, for good cause, adjourn the matter, proceed to hear the allegations and proofs of the parties, and if the complaint appear to be well founded, must commit the defendant to the county jail, or in the city of New York to the city prison of that city, for not exceeding one month, at hard labor, where he must be confined in a room with no other person; or may, by a certificate signed by him with his name of office, discharge the defendant from the service of his master, and the master from all obligations to the defendant.

§ 931. **Complaint against the master for cruelty, misuse or violation of duty.**—If a master be guilty of cruelty, misuse, refusal of necessary provisions or clothing, or any other violation of duty toward his apprentice or servant, as prescribed by special statutes, or by the indenture or contract of service, the apprentice or servant may make complaint, on oath, to any of the magistrates mentioned in section nine hundred and twenty-seven, who must summon the defendant before him at a specified time and place.

See *Killoran v. Barton*, 26 Hun, 648.

§ 932. **Hearing the complaint, and dismissing it or discharging the apprentice or servant.**—The magistrate must immediately, or at a time to which he may, for good cause, adjourn the matter, proceed to hear the allegations and proofs of the parties, and if the complaint be well founded, must, by a certificate under his hands, with his name of office, discharge the apprentice or servant from the service of his master; or if not, he must, by a similar certificate, dismiss the complaint.

See *Killoran v. Barton*, 26 Hun, 648.

§ 933. **Preceding sections not applicable to apprentice with whom money is received or agreed for.** — The preceding sections of this title do not extend to an apprentice whose master has received, or is entitled to receive, a sum of money with him, as a compensation for his instruction.

See *Killoran v. Barton*, 26 Hun, 648.

§ 934. **Complaint against master in such case, and direction thereon.** — Where money is paid or agreed to be paid, on binding out a clerk or apprentice, he may make the complaint mentioned in section nine hundred and thirty-one, and the magistrate to whom it is made must examine it, as provided in section nine hundred and thirty-two, and on such examination may make such order and direction between the parties as the justice of the case may require.

See *Killoran v. Barton*, 26 Hun, 648.

§ 935. **If complaint not compromised, the master to be held to appear at sessions.** — If, in the case mentioned in the last section, the complaint cannot be compromised, the magistrate must take a written undertaking from the master, for his appearance at the next court of sessions of the county, in a sum, and with sureties approved by him.

See *Killoran v. Barton*, 26 Hun, 648.

§ 936. **Proceedings thereon and order of the court.** — Upon hearing the parties, the court may, by an order entered upon the minutes, direct that the clerk or apprentice be discharged from service, and that the money paid or agreed for in binding him out, be refunded, if paid, to the person who advanced it, or his personal representatives, or if not paid, that it be discharged, and that any security given therefor be delivered up or canceled.

§ 937. **Complaint by master against clerk or apprentice, where money is paid or agreed for ; clerk or apprentice when held to appear at sessions.** — The master of a clerk or apprentice, where money is paid or agreed for on binding him out, may make the complaint mentioned in section nine hundred and twenty-seven, and the magistrate to whom it is made must proceed thereupon, as provided in sections nine hundred and twenty-eight to nine hundred and thirty, both inclusive, and may discharge

the complaint, or if in his opinion it be well founded, may take a written undertaking, in a sum and with sureties to be approved by him, for the appearance of the clerk or apprentice at the next court of sessions of the county.

§ 938. **Proceedings thereon, and order of the court.**— Upon hearing the parties, the court may proceed as provided in section nine hundred and thirty-six, and may punish the clerk or apprentice, by fine or imprisonment, or both, as for a misdemeanor.

§ 939. **Indenture or contract of service, how assigned on death of master.**— Upon the death of a master to whom a person has been bound to service, as clerk, apprentice or servant, by the county superintendents of the poor, or by the overseers of the poor, or in the city of New York, by the commissioners of charities and corrections, the personal representatives of the master may, with the written consent of the clerk, apprentice or servant, acknowledged before a justice of the peace or police justice, assign the indenture or contract of service to another, who thereby becomes vested with all the rights of the master.

§ 940. **Indenture or contract of service, how assigned on death of master.**— If, in the case mentioned in the last section, the written consent of the clerk, apprentice or servant be refused, the assignment may be made with the same effect, under an order of the court of sessions of the county, upon fourteen days' notice of the application therefor, to the apprentice, or to his parent or guardian, if there be any in the county.

TITLE X.

OF CRIMINAL STATISTICS.

- SECTION** 941. District attorney to furnish statement.
942. Duty of clerk.
943. Duty of clerk.
944. Duty of clerk.
945. Sheriff's report.
946. Sheriff's report.
947. Form of report.
948. Consequence of neglect.
949. Duty of secretary of state.

§ 941. **District attorney to furnish statement.**— Within ten days after the adjournment of any criminal court of record in this state, the district attorney of the county in which the court shall be held, must furnish to the clerk of the court such a description of the offense committed by every person convicted of crime, abridged from the indictment, as would be sufficient to maintain the averments relating to such offense, or necessary to be made in an indictment for a second offense.

§ 942. **Duty of clerk.**— Within twenty days after the adjournment of any criminal court of record, the clerk thereof must transmit to the office of the secretary of state such statement furnished by the district attorney, of all convictions had at such court.

§ 943. **Duty of clerk.**— Within twenty days after the adjournment of any criminal court of record, the clerk thereof must also transmit to the office of the secretary of state a duly certified statement of the number of indictments tried at such court, specifying the number for each separate offense, the number on which convictions were had, and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial.

§ 944. **Duty of clerk.**— On or before the fifth day of every month, the clerk of each county must transmit to the secretary of state copies of all certificates of convictions made by any court of special sessions, and required by law to be filed with such clerk, and which have been filed in the office of the county clerk during the previous month.

§ 945. **Sheriff's report.**— A report must be made by the sheriff of every county in which there is a city, on the first day of every month to the secretary of state, of the number of persons convicted in city courts, courts of special sessions, and police courts during the preceding month. Such reports must specify the crimes, the whole number convicted, the sex, age, nativity, and whether married or single; the degree of education, religious instruction, whether parents living or dead, temperate or intemperate, and whether before convicted or not of any crime.

§ 946. **Sheriff's report.** — Within twenty days after the adjournment of any criminal court of record, the sheriff of the county in which such court shall be held, must report to the secretary of state, the name, occupation, age, sex and native country of every person convicted at such court of any offense, and the degree of instruction which each person so convicted has received, and also such other items of information in relation to such convicts, and their offenses, as the secretary of state shall require.

§ 947. **Form of report.** — The report required by this title must be made in the form prescribed by the secretary of state.

§ 948. **Consequence of neglect.** — For every neglect of magistrate, clerk or sheriff to comply with the requirements of this title, he forfeits the sum of fifty dollars, to be recovered in a civil action, in the name of the people of this state.

§ 949. **Duty of secretary of state.** — The secretary of state must cause this title to be published, with forms and instructions for the execution of the duties therein prescribed, and to be distributed among the officers therein mentioned; the expense of which must be paid by the treasurer, on the warrant of the comptroller. He must also annually report to the legislature the results of the information obtained in pursuance of this title.

TITLE XI.

MISCELLANEOUS PROVISIONS, RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

Section 950. Parties to a special proceeding, how designated.

951. Provisions respecting entitling affidavits, applicable.

952. Courts and magistrates to issue subpoenas, and punish disobedience of witnesses.

§ 950. **Parties to a special proceeding, how designated.** — The parties prosecuting a special proceeding of a criminal nature, is designated in this Code as the complainant, and the adverse party as the defendant.

See *People v. Walsh*, 67 How. Pr. 484; 33 Hun, 846; 2 N. Y. Cr. Rep. 837.

§ 951. Provisions respecting entitling affidavits, applicable. — The provisions of this Code, in respect to entitling affidavits in a criminal action, are applicable to special proceedings of a criminal nature.

See *Comm'rs of Charities v. Hammill*, 88 Hun, 848; *People v. Walsh*, id. 845; 67 How. Pr. 484.

§ 952. Courts and magistrates to issue subpoenas, and punish disobedience of witnesses. — All courts and magistrates having before them special proceedings of a criminal nature, may issue subpoenas for witnesses, and punish their disobedience in the same manner as in criminal actions.

See *People v. Walsh*, 2 N. Y. Cr. Rep. 327; 67 How. Pr. 484; 88 Hun, 845; *Comm'rs of Charities v. Hammill*, id. 848.

GENERAL PROVISIONS AND DEFINITIONS APPLICABLE TO THIS CODE.

SECTION 953. Abatement of nuisance.

954 No part of this Code retroactive, unless expressly so declared.

955. Present tense includes future, etc.

956. Definition of "writing."

957. Definition of "oath."

958. Definition of "signature."

959. Definition of "magistrate."

960. Definition of "peace officer."

961. Definition of "court of sessions."

962. To what actions and proceedings this Code applies.

963. When Code to take effect.

§ 953. Abatement of nuisance. — Where a person is convicted of keeping or maintaining a public nuisance, and sentenced to punishment, the court may in its judgment, in addition to or in place of other punishment, direct that the nuisance be abated, and issue an order to the sheriff of the proper county to execute the judgment as therein directed.

See 1 Dill. Mun. Corp. (4th ed.), § 874; *Anderson v. Doty*, 88 Hun, 163; *Syracuse, etc., R. Co. v. People*, 66 Barb. 26.

§ 954. No part of this Code retroactive, unless expressly so declared. — No part of this Code is retroactive, unless expressly so declared.

§§ 955-957. Repealed 1892, chap. 677.

§ 958. Definition of "signature."—The term "signature" includes a mark, when the person cannot write; his name being written near it, and the mark being witnessed by a person who writes his own name as a witness, except to an affidavit or deposition, or a paper executed before a judicial officer; in which case the attestation of the officer is sufficient.

See Greenl. Ev. (14th ed.), § 674; 53 Am. Rep. 493, note.

§ 959. Definition of "magistrate."—Unless when otherwise provided, the term "magistrate" signifies any one of the magistrates mentioned in section one hundred and forty-seven.

§ 960. Definition of "peace officer."—Unless when otherwise provided, the term "peace officer" signifies any one of the officers mentioned in section one hundred and fifty-four.

§ 961. Definition of "court of sessions."—The term "court of sessions" includes "the court of general sessions in the city and county of New York," wherever such inclusion does not conflict with other provisions of this Code.

§ 962. To what actions and proceedings this Code applies.—This Code applies to criminal actions, and to all other proceedings in criminal cases which are herein provided for, from the time when it takes effect; but all such actions and proceedings, theretofore commenced, must be conducted in the same manner as if this Code had not been passed; except that if in any local statute confined, by its terms, to a town or village or to a county or city other than the city and county of New York, any proceeding is prescribed, in addition to those prescribed by this Code and not inconsistent with it, the same shall remain unaffected by it.

See Penal Code, § 719; *People, ex rel. Sherwin, v. Mead*, 64 How. Pr. 41; 92 N. Y. 415; *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 58; *McKeon v. People*, id. 456; 94 N. Y. 648; *Ostrander v. People*, 28 Hun, 48; 29 id. 513; 1 N. Y. Cr. Rep. 274; *People v. Beckwith*, 2 id. 29; *People v. Bork*, id. 56; 96

N. Y. 188; 2 N. Y. Cr. Rep. 177; *People v. Augsburg*, id. 561; *People v. Sessions*, 62 How. Pr. 415; 10 Abb. N. C. 192; *Kring v. Missouri*, 107 U. S. 221; *Hopt v. Territory*, 29 Alb. L. J. 837; *Marion v. State*, 16 Neb. 849; 81 Alb. L. J. 71; *People v. Holmes*, 41 Hun, 55; 5 N. Y. Cr. Rep. 180; *Comm'rs of Charities v. Hammil*, 33 Hun, 848; *Willett v. People*, 27 id. 469, 471; *People v. Hovey*, 92 N. Y. 558.

§ 963. **When Code to take effect.**—This Code shall take effect on the first day of September, eighteen hundred and eighty-one. When construed in connection with other statutes, it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code.

See *Matter of McMahon*, 64 How. Pr. 284; 1 N. Y. Cr. Rep. 58; *People v. Jefferson*, 101 N. Y. 20; 8 N. Y. Cr. Rep. 575; *People v. Sessions*, 62 How. Pr. 415; 10 Abb. N. C. 192; *Willett v. People*, 27 Hun, 470; *People v. Petrea*, 92 N. Y. 128; *People, ex rel., v. Sadler*, 2 N. Y. Cr. Rep. 439, 440; *Matter of Waters*, 66 How. Pr. 174; *Matter of Ramscar*, 1 N. Y. Cr. Rep. 38; *People v. Welch*, id. 488.

SUPPLEMENT TO THE CODE OF CRIMINAL PROCEDURE.

§ 9. An acquittal upon a charge of assault and battery is a bar to an indictment for rape, where both charges are based on the same transaction. *Peo. v. Purcell* (N. Y. Gen. Sessions, 1891), 16 N. Y., Supp. 199, Fitzgerald, J., in charging the jury, said: "I have given this case very careful consideration, and have examined such authorities as my attention has been called to by the learned counsel representing the defendant and the learned Assistant District Attorney, and I have made such investigation as it was possible for me to make during the time this matter has been under my consideration.

It is conceded that this indictment is based, in part, upon a statement of facts which formed the ground for a complaint against the defendant, charging him with the commission of a misdemeanor—assault in the third degree—and, furthermore, that he was tried and acquitted of the said assault in the Court of Special Sessions. This complaint, subscribed and sworn to by the prosecutrix, is part of the record and charges only an assault in the third degree. An indictment for rape necessarily includes an allegation of assault. The concession of the prosecution that the two accusations grew out of the same criminal act, leaves no facts in controversy to be determined by the jury, but devolves a question of law upon the Court. The District Attorney

admits that there was but one assault committed, and that some of the circumstances upon which he must rely to establish the truth of the allegations in this indictment formed the subject matter of the inquiry upon the former trial. Assault is an essential element in rape, and a learned commentator, discussing the question whether the conviction or acquittal upon an indictment covering one of the smaller crimes included within a larger will bar fresh proceedings for the larger, proceeds to say: 'If it will not, then the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest; while if he began with the largest, he must there stop—conclusion repugnant to good sense. Besides, as a larger includes a smaller, it is impossible one should be convicted of the larger without being also convicted of the smaller; and thus, if he had been found guilty or not guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller offense' (1 Bish. Crim. Law, 7th ed., § 1057).

That is the reasoning of Bishop reviewing these cases that have been referred to on both sides of this argument, and laying down such general rules as it was possible to lay down for the guidance of Courts governing these matters.

Chief Justice Pierson says: 'There

is considerable conflict in the authorities upon this subject, but we think the rule is now well established that when one offense is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other' (State v. Smith, 43 Vermont, 324; Reg. v. Erlington, 9 Cox C. C., 86).

Nor can the contention of the prosecution, that the Court in which the former trial was had had not jurisdiction to try a felony, be of any avail. It was a Court of competent jurisdiction to determine the guilt or innocence of the defendant upon the accusation made then against him by the prosecutrix. The complaint in one case and the indictment in the other set out offenses which relate to one transaction. It is true that one contains more of criminal charge than the other, but upon it there could be a conviction of what is embraced in the other. This brings the offenses, though of differing names, within the constitutional protection from a second jeopardy. There are some exceptions to this general rule, as where death would result after conviction of an assault, 'but the new element of the injured person's death is not merely a supervening aggravation; it creates a new crime.' (Stewart's case, 5 Irvine, 310).

I therefore instruct you, gentlemen of the jury, to find, upon the special plea interposed here, a verdict for the defendant." (See also, 14 Eng. Rep. 657; People v. Saunders, 4 Park., 196.

In *Simmons v. United States*, 142 U. S., 148, a trial upon an indictment for embezzlement, after evidence had been given for the prosecution, an affidavit was produced alleging that a juror, on his *voir dire*, falsely swore

that he had no acquaintance with the accused. Thereafter a letter commenting upon this affidavit was published in a newspaper, and was read by members of the jury. *Held*, that the court was warranted in dismissing the jury, and that a new trial was not barred on the ground of former jeopardy. GRAY, J., said: "The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict, was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: 'We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But after all they have the right to order the discharge; and the

security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office.' *United States v. Perez*, 9 Wheat. 579. A recent decision of the Court of Queen's Bench, made upon a full review of the English authorities, and affirmed in the Exchequer Chamber, is to the same effect. *Winsor v. Queen*, L. R., 1 Q. B. 289, 390; 6 Best & S. 143, and 7 id. 490. There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused. As was well said by Mr. Justice Curtis in a case very like that now before us: 'It is an entire mistake to confound this discretionary authority of the court to protect one part of the tribunal from corruption or prejudice with the right of challenge allowed to a party; and it is at least equally a mistake to suppose that in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case. *United States v. Morris*, 1 Curt. 23, 37.' * * * It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering

the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury; and the defendant was not thereby twice put in jeopardy, within the meaning of the fifth amendment to the Constitution of the United States."

§ 53. *People, ex rel. Comrs., etc. v. Glaze*, 65 Hun, 560.

§ 56. See *Matter of Bray*, 34 State Rep'r, 641; *People v. Dewey*, 33 id. 427; *People, ex rel. Coon v. Wood*, 35 id. 841; *People v. Upton*, 9 N. Y. Supp. 684; *People v. Christy*, 65 Hun, 351.

§ 68. *Laws 1872, ch. 284; Laws 1891, ch. 191; Laws 1882, ch. 360, p. 493.*

§ 74. *Kolzern v. Broadway, etc., R. Co.*, 48 State Rep'r 657; 1 Misc. Rep. 148.

§§ 94, 95, 96. In the New York Star of Dec. 17, 1890, appeared the following: John Cavanagh was taken before Judge Andrews of the Supreme Court yesterday on a writ of *habeas corpus* and during the examination a most peculiar phase of the criminal law was brought to the attention of the court. Cavanagh was arrested in October for threatening to injure his sister. He was brought before Police Justice Smith and bound over in \$500 to keep the peace. As he was unable to furnish bonds, he was committed to the Tombs in default and has remained in the city prison ever since. When his counsel called the attention of Judge Andrews to sections 94, 95 and 96 of the Code of Criminal Procedure, the court decided that while there was a method under these sections to put a man into prison, there

was no means of getting him out. In order to release him, *habeas corpus* proceedings must be begun, as was done in this case. Assistant District Attorney Grosse, who represented the people, was willing to admit the law was a harsh one. He knew of no method by which a prisoner held for this cause could be released from jail or brought to trial in the ordinary fashion. Judge Andrews spoke at some length in giving his decision. It was clear that the present state of the law permitted a man who was imprisoned for this cause to remain in jail possibly for the whole period of his life. It was impossible that the spirit of our laws should contemplate a life imprisonment when there was no crime and no trial. In this case all that was alleged against this man was that he had threatened to injure his sister. This was not a cause for life imprisonment even were it brought into court. Under these circumstances the court held the law to be invalid. Cavanagh was then discharged.

§ 145. *Hewitt v. Newburger*, 66 Hun, 232.

§ 177. See *Tuppin v. Morin*, 25 Abb. N. C. 402.

Where a certain intent is essential to constitute a crime, and it should be shown that no such intent existed, it may be doubted whether any outward acts will be an unquestionable justification for making the arrest. *Smith v. Botens*, 13 N. Y. Supp. 222.

§ 203. Meaning of phrase "prosecutor and his counsel." *People ex rel. Howes v. Grady*, 66 Hun, 466; 50 State Rep'r, 128.

§ 211. *Austin v. Vroman*, 128 N. Y. 235.

§ 223. Legislature may abolish grand jury, 116 U. S. 265; id. 516.

§ 268. In *State v. Barker* (No. Car.),

12 So. E. Rep'r, 116, it was held that a statute making the concurrence of nine grand jurors sufficient to the finding of an indictment was unconstitutional.

§ 273. *People v. Laurence*, 137 N. Y. 521.

§ 275. See *People v. Harris*, 123 N. Y. 71; *People v. Laurence*, 137 id. 521; *People v. Stark*, 136 id. 538; 56 Hun, 58; *People v. Ostrander*, 64 id., 336; *People v. Rice*, 35 State Rep'r, 186; *People v. Gregg*, id. 758.

§ 276. *People v. Maxon*, 32 State Rep'r, 133; 57 Hun, 370; *People v. Rice*, 35 State Rep'r, 176; *People v. Gregg*, id. 758; 59 Hun, 109; *People v. Ostrander*, 64 id. 336.

§ 278. *People v. Rice*, 35 State Rep'r, 186; *People v. Harman*, 49 Hun, 558.

§ 279. See 16 Am. St. Rep. 30; 12 Cr. L. Mag. 222.

§ 283. See 16 Am. St. Rep. 30; *People v. Gregg*, 59 Hun, 109; *People v. McKenna*, 81 Cal. 153; *State v. Watkins*, 101 N. C. 703; *Loehr v. People*, 133 Ill. 510.

§ 284. *People v. Laurence*, 137 N. Y. 522; *People v. Ostrander*, 64 Hun, 336; *People v. Peck*, 67 Hun, 576. In *People v. Horton*, 62 Hun, 610, the indictment did not specify any place where the alleged crime was committed. *Held*, that the indictment was defective and a demurrer was properly allowed.

§ 285. *People v. Ostrander*, 64 Hun, 340.

§ 289. *People v. Stark*, 59 Hun, 59; 136 N. Y. 538.

§ 291. *People ex rel. v. House of Mercy*, 128 N. Y. 185; *People v. Ostrander*, 64 Hun, 340.

§ 292. *People v. Cotto*, 31 N. Y. 577.

§ 293. An indictment for libel may be amended upon notice by inserting

words accidentally omitted, which constituted a part of the published libel. The defendant cannot be surprised or misled by such amendment. *People v. Clegg*, 32 State Rep'r, 701. See *People v. Formosa*, 131 N. Y. 479.

§ 313. *People v. Clark* (N. Y. Oyer & T.), 5 N. Y. L. J. 495; 8 N. Y. Cr. Rep. 169; *People v. Brickner*, 8 N. Y. Cr. Rep. 217.

§ 323. *People v. Gregg*, 59 Hun, 112; *People v. Tower*, 135 N. Y. 429.

§ 431. *People v. Tower*, 17 N. Y. Supp. 395; 135 N. Y. 457; *People v. Meakim*, 133 N. Y. 214; *People v. Connor*, 65 Hun, 394.

§ 332. *People v. Trimble*, 131 N. Y. 118; 60 Hun, 365; *People v. Connor*, 65 Hun, 396.

§ 336. A defendant who has been arraigned and has pleaded not guilty is not entitled to be rearraigned that he may plead again on a second trial ordered upon a reversal of the first conviction. *People v. McElvaine*, 125 N. Y. 600.

§ 340. *People v. Meakim*, 61 Hun, 328; affirmed, 133 N. Y. 214.

§ 344. See *People v. Clark*, 5 N. Y. L. J. 243; *Price v. People*, 12 Cr. L. Mag. 469; *People v. Powell* (Cal.), 43 Alb. L. J. 225; *Leighton v. People*, 88 N. Y. 117.

§ 354. *People v. Connor*, 65 Hun, 396.

§ 355. See 14 Cr. L. Mag. 746; *People v. Rouse*, 15 N. Y. Supp. 414.

Section 1083 of the Penal Code of California, which provides that the state may have a change of venue in a criminal action, "on the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of defendant in the county where the action is pending," is void, being in conflict with the Bill of Rights of California, § 7, providing that "the right of trial by

jury shall be secured to all and remain inviolate," the right secured being the right to trial by a jury of the vicinage as it existed at common law. *People v. Powell* (Cal.), 43 Alb. L. J. 225. The court says: "Now that in a jury trial it is implied that the trial shall be by a jury of the vicinage is familiar law. Blackstone says that the jurors must be 'of the *riens* or neighborhood, which is interpreted to be of the country where the act is committed.' 4 Com. 350. This is an old rule of the common law (2 Hawk. P. C., chap. 40; 2 Hale P. C. 264); and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all. 2 Hawk. P. C., chap. 25; 1 Chit. Crim. Law, 177. This over nicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament, as the supreme power of the realm, made some exceptions which are enumerated by Mr. Chitty in his treatise on Criminal Law (vol. 1, p. 179), the chief of these being cases of supposed treason or misprision of treason examined before the Privy Council, and which under the statute of Henry VIII might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British Empire. If they were forbidden by the unwritten Constitution of England, they are certainly unauthorized by the written Constitutions of the American States, in which the utmost

pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest, (*Kirk v. State*, 1 Cold. 344; *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52); but this may be pressing the principle too far (*State v. Robinson*, 14 Minn. 447 [Gil. 838]; *Gut v. State*, 9 Wall. 35); but no one doubts that the right to a trial by a jury of the vicinage is as complete and certain as it ever was, and that in America it is indefeasible. 1 Bish. Crim. Law (2d ed.), § 552; Whart. Crim. Law, § 277; *Paul v. Detroit*, 32 Mich. 108; *Ward v. People*, 30 id. 116. This was decided under a constitutional provision the same in effect as our own, and is directly in point."

§ 371. *People v. Hughes*, 137 N. Y. 29, 30; 50 State Rep'r, 65.

§ 372. 2 Chicago L. J. 718; *People v. Hughes*, 137 N. Y. 29.

§ 373. A prisoner indicted for manslaughter is entitled to twenty peremptory challenges. *People v. Keating*, 61 Hun, 260.

§ 375. A juror not understanding and speaking English cannot be forced upon a prisoner, although his peremptory challenges may have been exhausted. *McC Campbell v. State*, 9 Tex. Ct. App. 124; 35 Am. Rep. 726. See, also, *Matter of Allison*, 13 Colo. 525; 16 Am. St. Rep. 224.

§ 376. See *People v. Fanshawe*, 137 N. Y. 68, 77.

In *People v. Martell*, 138 N. Y. 595, on a trial for murder, two jurors, being challenged, testified that, from what they had read of the transaction and the facts in the case, they had formed an opinion, which would require evidence to remove, but that,

notwithstanding the opinion thus formed, they "thought" they could render an impartial verdict according to the evidence. The court ruled they were competent, no exception was taken, and said jurors were not challenged peremptorily. It was claimed on appeal that they were incompetent as jurors, as to render a juror competent who has thus formed an opinion, he is required by the statute to testify that he "believes," not that he thinks, his opinion will not influence his verdict. *Held*, untenable; that it was not necessary that the juror should testify in the precise words of the statute, and the two expressions were substantially equivalent.

On the examination of a juror as to his qualification to serve on a trial for murder where the homicide was committed by the defendant with a pistol which he had been in the habit of carrying, the juror stated that he had a great prejudice against the defendant by reason of the fact that he carried a pistol, and that he did not believe a man had any right to carry a deadly weapon; the juror was not asked to, and did not, declare that he believed such prejudice would not influence his verdict. *Held*, that the juror was incompetent, and that it was error to overrule a challenge for cause. *People v. Larubia*, 69 Hun, 197.

§ 377. A person is not competent to sit as a juror in a criminal case where his third cousin is the complainant. *People v. Clark*, 62 Hun, 84.

— Subd. 8. *People v. Wood*, 131 N. Y. 618.

§ 380. When it is understood by the court and by both parties that a challenge to a juror for actual bias is being tried, an exception to the overruling of a challenge for cause may be available, although the require-

ments of this section may not have been strictly complied with. *People v. Larubia*, 69 Hun, 197.

§ 385. *People v. McGonegal*, 136 N. Y. 62.

§ 386. *People v. McGonegal*, 136 N. Y. 62.

§ 387. A statute providing that after the impaneling of a jury, if from any cause any of the jurors shall be unable to attend, the court may enter that fact on their journal or docket, setting forth the cause of such inability, and the proceeding shall then continue in the same manner and with the same effect as if the whole panel were present, provided that the number of jurors so absent shall not be greater than three in a jury of twelve, is unconstitutional. *McRae v. Grand Rapids, etc.*, R. Co. — Mich. —; 46 Alb. L. J. 529.

§ 388. *People v. Connor*, 65 Hun, 396.

§ 389. See 20 N. Y. Supp. 187; 28 Am. St. Rep. 170; *People v. Benedict*, 49 State Rep. 286; 25 Weekly L. Bull. 362; 16 Am. St. Rep. 410.

Upon the trial of an indictment for murder, the prosecution proved the death, and by circumstantial evidence established that it was caused by a pistol shot fired by defendant. The latter testified that the killing was accidental. The court charged the jury in substance that a homicide proved implied crime on the part of the slayer; that a conviction must follow unless defendant justified or excused the act; that the burden of that defense was upon him, and to secure acquittal he must be able to show a legal justification or excuse. *Held*, error, as it deprived defendant, so far as his defense was concerned, of the benefit of a reasonable doubt; that whether the crime proved was murder or manslaughter in one of the

degrees specified in the statute, or justifiable or excusable homicide, depended upon the intention and circumstances of its perpetration, and mere proof of the killing, raised no legal implication that the crime of murder had been committed. *People v. Downs*, 128 N. Y. 558.

In *People v. Hughes*, 137 N. Y. 80, the court charged, in substance, that a "reasonable doubt" could not be said to exist when the jury are so firmly convinced of the facts necessary to establish the prisoner's guilt, that if it was a very grave and serious matter, affecting their own affairs, they would not hesitate to act upon such a conviction. *Held*, no error.

In *People v. Pallister*, 133 N. Y. 601, it was held that where the trial court charges fully, clearly and properly as to the presumption of innocence and the right of the accused to the benefit of every reasonable doubt upon the evidence, a denial of a request to charge the same propositions in different language is not error.

In *People v. Sweeney*, 133 N. Y. 609, distinguishing *Remsen v. People*, 43 N. Y. 6, the court having instructed the jury that proof of defendant's good character raised the question whether he was a man who would likely commit the crime charged, and that it would actually outweigh evidence that might otherwise appear conclusive, and in a doubtful case turn the scale in defendant's favor, there was no error in a further charge that good character would not avail defendant, if the crime had been satisfactorily proven beyond a reasonable doubt.

§ 391. It is immaterial upon the trial of a party charged with a felony, whether one jointly indicted with him for the offense has been acquitted or not. *People v. Kief*, 37 State Rep'r, 478.

When a party jointly indicted with another for an offense charged to have been the result of their joint act, is tried separately either upon his own election or otherwise, the indictment is well supported by proof sufficient to warrant a conviction, if the party on trial had been alone indicted. *People v. Cotto*, 181 N. Y. 577.

§ 392. *People v. Lewis*, 16 N. Y. Supp. 884; *People v. Hill*, 65 Hun, 428.

§ 393. *People v. Tice*, 181 N. Y. 651; 14 Cr. L. Mag. 570.

Any reference by counsel for prosecution to the accused's failure to take the stand is improper, under the act of March 15, 1878 (20 Stat., p. 80, chap. 37), which provides that such failure "shall raise no presumption against the defendant." *Wilson v. United States*, — U. S. —; 47 Alb. L. J. 474.

In that case the district attorney, in summing up the case to the jury, said: "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime." The court, its attention being called to this language by defendant's counsel, said: "I suppose the counsel should not comment upon the defendant not taking the stand." The district attorney replied: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." Counsel for defendant thereupon excepted. A verdict of guilty was rendered. *Held*, that the refusal or neglect of the court to prohibit any reference to the accused's failure to take the stand, and to emphatically instruct the jury not to attach any importance to such

failure, was error, tending to prejudice defendant, and was sufficient ground for awarding a new trial.

Where a defendant in a criminal action offers himself as a witness, he is subject to the same rules of examination as apply to other witnesses. *People v. McCormick*, 135 N. Y. 663.

On a trial for murder, the defendant on cross-examination was asked if he did not at a time and place specified draw a pistol on two persons and threaten to kill them. *Held*, no error to overrule an objection to the question; the evidence was competent on the question of the credibility of the witness.

§ 395. See 31 Am. L. Reg. (N. S.) 776; *People v. Cassidy*, 133 N. Y. 612.

When the defendant in a criminal action testifies that a confession, admitted in evidence against him, was made by him by reason of threats, and all the persons to whom the confession was made testify that no threats were employed, and the jury find the defendant guilty, and the case on appeal does not contain the judge's charge, the General Term must assume that the charge correctly stated the rules of law relating to confessions, and that the jury found the confession to have been voluntary. *People v. Bishop*, 69 Hun, 105.

Under such circumstances, the conviction is not open to the objection that evidence was admitted of a confession "made under the influence of fear produced by threats," and, therefore, within the prohibition of this section. *Id.*

§ 399. *People v. White*, 62 Hun, 114; *People v. Christy*, 65 id. 352; *Farrell v. Friedlander*, 63 id. 259; *People v. Bosworth*, 54 id. 75; *People v. Dunn*, 53 id., 382.

§ 410. *People v. Fanshawe*, 65 Hun, 79.

§ 418. The failure of the court to inform the jury that they are the exclusive judges of the law and facts does not require a reversal, no such instruction having been requested. *Keyes v. State*, 13 C. L. Mag. 600.

§ 420. See 10 Cr. L. Mag. 159; *Snarp v. State*, 51 Ark. 147; 14 Am. St. Rep. 27; *Mead v. State*, 53 N. J. L. 601; *People v. Fanning*, — N. Y. —, 8 N. Y. Cr. Rep. 363.

§ 427. See *People v. Kennedy*, 57 Hun, 534; *People v. Parker*, 137 N. Y. 535.

§ 437. *People v. Trimble*, 131 N. Y. 118; 60 Hun, 365.

§ 442. Applies only to judgment in case of special verdict. 65 Hun, 399.

§ 453. *People v. Trimble*, 60 Hun, 365; 131 N. Y. 118.

§ 455. *People v. McGonegal*, 136 N. Y. 62.

§ 463. *People v. Flack*, 8 N. Y. Cr. Rep. 31.

§ 465, subd. 2. See *Matter of Choate*, 24 Abb. N. C. 437; 8 N. Y. Cr. Rep. 10.

Subdivision 3. See 28 Am. Law Reg. (N. S.) 709. In *People v. Schad*, 58 Hun, 571; 35 State Rep'r, 149, after the jury had retired and during the time they were deliberating on their verdict, one of them separated from the rest, went to the bar of the hotel where they were taking their meals, and called for and drank brandy. *Held*, that this was misconduct on the part of the jury which furnished ground for setting aside the verdict and granting a new trial.

Where a sick juror had been separated from his fellow jurors during a recess of the court before verdict, and it appeared that he had not been tampered with, a motion to discharge the jury was rightly overruled. *Stout v. State (Md.)*, 47 Alb. L. J. 4.

§ 467. *People v. Tower*, 135 N. Y. 457; *People v. Meakim*, 133 id. 214.

§ 471. *People ex rel. Benton v. Court of Sessions*, 66 Hun, 552; *People v. Trimble*, 131 N. Y. 118; 60 Hun, 365.

§ 472. *People v. Trimble*, 131 N. Y. 118; 60 Hun, 365.

§ 473. A prisoner must be present when sentenced for a felony; and this must appear by the record. An entry in the record that defendants in open court excepted to the sentence "this day pronounced upon them" is insufficient as it admits of the construction that the exception was entered by their attorneys. *Ball v. United States*, 140 U. S. 118.

§ 480. *Ball v. United States*, 140 U. S. 118.

§ 481. *People v. McElvaine*, 125 N. Y. 600.

§ 482. *People ex rel. v. Court of Sessions*, 66 Hun, 553.

§ 483. *People ex rel. v. Court of Sessions*, 66 Hun, 553.

§ 485. *People v. Trezza*, 128 N. Y. 532; *Noonan v. People*, 5 N. Y. L. J. 1107.

§ 488. See 45 Fed. Rep'r, 352.

§ 491. *People v. Trezza*, 60 Hun, 401; *McElvaine v. Brush*, — U. S. —, 45 Alb. L. J. 87; 8 N. Y. Cr. Rep. 300.

§ 515. *People ex rel. Comrs. v. Glaze*, 65 Hun, 561; *People v. Murray*, 16 N. Y. Supp. 325.

§ 517. *People v. Trezza*, 128 N. Y. 532.

§ 518. Under the former practice a writ of error would not lie in behalf of the people after a judgment for defendant. *People v. Corning*, 2 N. Y. 9.

§ 527. See *New York Law Journal*, Dec. 16, 1891; *People v. Zounek*, 49 St. Rep'r, 643; *People v. Brooks*, 131 N. Y. 321; *People v. Webster*, 59 Hun, 402.

The provision of this section as

amended (Laws 1887, chap. 493) does not authorize an interference with the findings of a jury when supported by sufficient evidence, unless it appears from the whole record that injustice has been done. *People v. Trezza*, 125 N. Y. 740.

§ 528. See *New York Law Jour.* (Dec. 7, 16, 1891); *People v. Fish*, 125 N. Y. 144; *People v. Trezza*, 128 id. 536; 8 N. Y. Cr. Rep. 283, 291; *People v. Taylor*, 138 N. Y. 298; *People v. Hamilton*, 137 id. 431; *People v. Van Brunt*, 108 id. 636; 8 N. Y. Cr. Rep. 227; *People v. Lobby*, 128 N. Y. 629; 8 N. Y. Cr. Rep. 318; *People v. Driscoll*, — N. Y. —; 8 N. Y. Cr. Rep. 455.

§ 542. See *People v. Wood*, 126 N. Y. 249; *People v. Wayman*, 128 id. 588; *People v. Laurence*, 137 id. 517; *People v. Clark*, 49 State Rep'r, 501; *People v. Hartley*, 51 id., 804; *People v. Kennedy*, 49 id., 814; *People v. Bosworth*, 64 Hun, 83; *People v. Fanshawe*, 65 id. 97.

§ 543. *People v. Kellogg*, 67 Hun, 551.

§ 544. *People v. Webster*, 59 Hun, 402.

§ 546. When a prisoner sentenced to death carries his case to an appellate court, due process of law does not require that he shall be personally present therein when it pronounces its judgment. *Schwab v. Berggren* (U. S. Sup. Ct. reviewing *Fielden v. People*, 128 Ill. 595; *Donnelly v. State*, 26 N. J. L. 463; *State v. Overton*, 77 N. Car. 485).

§ 547. *People v. Bosworth*, 64 Hun, 83; *People v. Severance*, 67 id. 190.

§ 548. *People v. Severance*, 67 Hun, 190; *People v. Bosworth*, 64 id. 83.

§ 568. *People v. Gillman*, 125 N. Y. 374.

§ 593. *People v. Bennett*, 136 N. Y. 482; 137 id., 601.

§ 597. *People v. Nooney*, 64 Hun, 171.

§ 598. *People v. Nooney*, 64 Hun, 171.

§ 613. *People v. Van Tassel*, 64 Hun, 449.

§ 619. *People v. Van Tassel*, 64 Hun, 450.

§ 658. Under this section the appointment of a commission is discretionary with the court. *People v. McElvaine*, 125 N. Y. 600; citing *Webber v. Com.*, 119 Penn. St. 238; *Jones v. State*, 13 Ala. 153; *Bonds v. State*, 1 Mart. & Y. 142; *State v. Arnold*, 12 Iowa, 480; *People v. Ah Ying*, 42 Cal. 18.

§ 684. *People v. Gillman*, 125 N. Y. 375; 137 id. 522.

§ 719. *People ex rel. v. Glaze*; 65 Hun, 561.

§ 764. *People v. Clark*, 16 N. Y. Supp. 695.

§ 772. *People v. Clark*, 16 N. Y. Supp. 695.

§ 827. *Matter of Scrafford*, 59 Hun, 327, 329.

§ 840. *People ex rel. Moore v. Beehler*, 63 Hun, 44.

§ 841. *People ex rel. Moore v. Beehler*, 63 Hun, 44.

§ 851. *People ex rel. Moore v. Beehler*, 63 Hun, 44.

§ 887. *People ex rel. Duntz v. Coon*, 67 Hun, 523.

§§ 899-904. *Mayor, etc. v. Ehraam*, 16 N. Y. Supp. 527.

§ 914. *Ulrich v. Ulrich*, 17 N. Y. Supp. 721.

F O R M S

TO THE

CODE OF CRIMINAL PROCEDURE.

No. 1.

Notice of motion for the removal of an indictment from the Court of Sessions to the Court of Oyer and Terminer. (See Code Crim. Pro., §§ 22, 24d.)

RENSSELAER COUNTY — COURT OF SESSIONS.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

To.....*District Attorney of.....county.*

SIR.— Please to take notice that on the petition and affidavit of John Doe, hereto annexed, I will apply to the supreme court of the State of New York, at a special term thereof, to be held at the court-house in the city of, N. Y., on the 10th day of January, A. D. 1892, at eleven o'clock A. M. of that day, or as soon thereafter as counsel can be heard, for a rule or order removing the indictment in the above entitled action, from the court of sessions of said county to the court of oyer and terminer, and for such other and further relief in the premises as may be just.

Yours, etc.,

SMITH & WELLINGTON,
Defendant's Attorneys.

No. 2.

Application for the removal of an indictment, before trial, from the Court of Sessions to the Court of Oyer and Terminer. (See Code of Crim. Pro., §§ 22, 24d.)

To.....*the supreme court of the State of New York:*

The petition of John Doe respectfully shows, that at a stated term of the court of sessions, held in and for the county of Rensselaer in said State, on the first Monday of January, A. D. 1892, an indictment was duly presented by the grand jury of the body of the people of said county to said court, against your petitioner, wherein your petitioner was charged with having on the 10th day of December, 1891, at the city of Troy, N. Y., committed

the offense of arson in the first degree. That a certified copy of said indictment is hereto annexed. That your petitioner has been arrested upon a bench warrant issued upon the presentment and filing of said indictment in said court; and at the January term thereof was duly arraigned in open court and pleaded not guilty to said indictment by demanding a trial thereon. That thereupon said indictment was, by order of the said court of sessions, made at the said January term thereof, and on motion of the district attorney of said county, continued until the March term of said court; and that your petitioner thereupon, before the said court of sessions, gave recognizance, with good and sufficient sureties, to appear at the said March term of said court of sessions for his trial upon said indictment, and to do and receive what should by the said court be then and there enjoined upon him [state with particularity the facts and circumstances relied upon as a defense]. That your petitioner has fully and fairly stated the case to Messrs. Smith & Wellington, his counsel, who reside at Troy, N. Y., in said county of Rensselaer, and that he has a good and substantial defense upon the merits of said indictment, as he is informed by said counsel, after such statement made as aforesaid, and verily believes to be true [state facts and circumstances showing why a removal of the indictment becomes necessary], to wit, that upon the trial of said indictment intricate, novel and perplexing questions of law will arise, as he is advised by his said counsel after such statement made as aforesaid, which, together with the facts and circumstances constituting the defense of your petitioner to said indictment, and the facts and circumstances above set forth, renders the removal of the trial of said indictment from the said court of sessions to the next oyer and terminer, to be held in said county of Rensselaer, expedient and proper [or that your petitioner is anxious for a more speedy trial than can be obtained in the court of sessions]; or that, under section 848, one or more trials have been had in which no verdict was reached, and by reason of popular feeling or otherwise it is expedient to remove the cause to another county. [Of course the facts and circumstances that render a removal expedient and proper will depend upon the peculiarities of each individual case, and must be set forth with clearness and particularity].

And your petitioner will ever pray, etc.

Dated March 1, 1889.

JOHN DOE

STATE OF NEW YORK, } ss. :
COUNTY OF RENSSELAER, }

John Doe, being duly sworn, says that he is the petitioner named in and who subscribed the foregoing application; that he has read the same, knows its contents, and that it is in all respects correct and true.

JOHN DOE

Subscribed and sworn before }
me, March 1, 1889. }

GEO. R. DONNAN,
Clerk of Deeds, Troy, N. Y.

No. 3.

Order on application removing indictment from Court of Sessions & Oyer and Terminer.

SUPREME COURT—RENSSELAER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

At a special term of the supreme court of the State of New York, held at the court-house, in the city of Troy, on the 10th day of January, A. D. 1882.

Present—Hon. C. R. INGALLS, Justice Supreme Court.

Upon reading and filing the foregoing application of John Doe, and a certified copy of the indictment against the same charging him with arson in the first degree, presented and filed at a court of sessions held in and for the county of Rensselaer, on the first Monday of January, A. D. 1882; and after hearing Smith & Wellington in support of said application, and La Motte W. Rhodes, district attorney of Rensselaer county, in opposition thereto, it is hereby ordered that said indictment be and is hereby removed from the court of sessions of the county of Rensselaer to the next court of oyer and terminer to be held in and for the said county of Rensselaer, and that the trial of the said John Doe be had in the last-mentioned court.

C. R. INGALLS,

Justice Sup. Court.

No. 4.

Recognizance to accompany order removing indictment when the defendant is not in confinement.

COURT OF OYER AND TERMINER.

THE PEOPLE, ETC.,
against
 JOHN DOE.

STATE OF NEW YORK, }
 COUNTY OF RENSSELAER. } ss.:

Be it remembered that on this 10th day of January, A. D. 1882, John Doe James Burke and Richard Roe, all of the city of Troy, county and state aforesaid, personally came before me, C. R. Ingalls, a justice of the supreme court of the State of New York, and each of them separately and by himself and for himself acknowledged himself to be indebted to the people of the State of New York in the sum of one thousand dollars if default be made in the following conditions:

Wherefore, upon the written application of the said John Doe, the above named justice of the supreme court, in pursuance of the provisions of the statute, has removed the indictment against the said John Doe, presented and filed in the court of sessions of the said county of Rensselaer, on the first Monday of January, A. D. 1882, for arson in the first degree, from the said

court of sessions to the next oyer and terminer, to be held in and for the county of Rensselaer; and directed the trial of the said John Doe on said indictment to be held in the said last mentioned court.

Now, therefore, the condition of this obligation is such that if the said John Doe personally appear at the next oyer and terminer to be held in and for the county of Rensselaer, at the court-house in the city of Troy, on the second Monday of May, 1882, and at such other time as such court shall appoint, and shall stand trial upon the issue joined, and shall not depart said court of oyer and terminer without leave, then this recognizance to be void, otherwise to abide in full force and effect.

JOHN DOE. [L. a.]
JOHN BURKE. [L. a.]
RICHARD ROE. [L. a.]

Taken and acknowledged before }
me, January 10, 1882. }

O. R. INGALLS,
Justice Supreme Court.

No. 5.

Affidavit to obtain order for stay. (§ 347.)

RENSSELAER COUNTY, ss. :

Albert Smith, of Troy, N. Y., being duly sworn, says that he is one of the attorneys for the John Doe, the prisoner under arrest, charged by indictment with the crime of arson [state with particularity the nature of the crime; also the facts and circumstances which render a removal necessary]; that the next term of the court of sessions will be held on the 9th of June, 1882, in and for the county of Rensselaer aforesaid, and that this deponent is about to make a motion for the removal of the said indictment from the said court of sessions to the court of oyer and terminer, and that there is not now time to move the court for such an order before the convening of the said court of sessions.

ALBERT SMITH

Sworn before me, }
June 5, 1882. }

GEO. R. DONNAN,
Com. of Deeds, Troy, N. Y.

No. 6.

Order granting stay. (Code Crim. Proc., § 567.)

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

At a special term of the supreme court of the State of New York, held at the chambers of Hon., in the city of on the day of, 188..

Present—Hon., *Sup. Court Judge.*

On reading and filing the affidavit of Albert Smith, hereto annexed, and on motion of Smith & Wellington, attorneys for John Doe, it is hereby ordered that the trial, and all proceedings under the indictment of John Doe, be and are hereby staid until the determination of the application of said John Doe for an order removing said indictment, as set forth in said affidavit.

.....
Jus. Sup. Ct.

No. 7.

SURETY OF THE PEACE.

Information for the purpose of obtaining surety of the peace. (See Code Crim. Proc., § 84.)

COUNTY OF RENSSELAER, ss. :

Raymond Coon, of the city of Troy, county of Rensselaer and State of New York, upon his oath complains that John Doe, of the same place, has threatened to commit an offense against the person [or property] of this complainant, to wit, to kill, beat or maim, or commit an assault and battery upon this complainant, and to do him great bodily harm, and that this complainant has just cause to fear that the said John Doe will carry into effect the above threats [or that the said John Doe has threatened to burn, destroy or injure the property of this complainant, etc.].

The said Raymond Coon, therefore, prays that proper legal process may be issued, and that surety of the peace may be granted to him against the said John Doe; and this complainant hereby avers that he makes this complaint not from malice or ill-will toward the said John Doe, but simply because of the threats above set forth, and a belief that the said John Doe will carry said threats into effect to the bodily harm and injury of this complainant.

Wherefore, this complainant prays that a warrant may issue against the said John Doe, and that he be arrested thereupon, and that such other proceedings be had in the premises as are provided for in the statute.

RAYMOND COON.

The above-named complainant, Raymond Coon, on the 1st day of January, A. D. 1882, in the city, county and state aforesaid, personally came before me, and being duly sworn, made oath to the truth of the foregoing complaint by him subscribed.

R. C. JENYSS,
Police Justice.

No. 8.

Examination of the complainant and his witnesses upon the foregoing complaint
(Code Crim. Proc., § 85.)

POLICE COURT (OR JUSTICES' COURT) OF THE CITY OF.....
(OR TOWN OF.....)

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

The examination of Raymond Coon and Jacob Saunders, taken on oath before me, R. C. Jenyss, police justice, Troy, N. Y., January 1st, A. D. 1882, upon the complaint of the said Raymond Coon, for the purpose of obtaining surety of the peace;

The said Raymond Coon being by me duly sworn says [here set forth with particularity the proof of the facts alleged in the complaint.]

And the said Jacob Saunders, being likewise by me duly sworn, says that he was present when the threats against the said Raymond Coon were made by the said John Doe, as alleged in his said complaint, and that such threats were as follows [here set forth with particularity the evidence tending to substantiate the facts alleged in the complaint.]

RAYMOND COON.
JACOB SAUNDERS.

Sworn to before me, }
January 1st, 1882. }

R. C. JENYSS,
Police Justice.

No. 9.

Warrant of arrest. (See Code Crim. Proc., § 86.)

POLICE COURT (OR JUSTICES' COURT) OF.....

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To the sheriff of said county, or to any constable, marshal or policeman of the city or town, GREETING :

Whereas, Raymond Coon, of the city of Troy, in said county of Rensselaer, did, on the 1st day of January, 1882, make complaint in writing and upon oath, before me, that John Doe, of the same place, did threaten to commit grievous offenses against the property [or person] of him, the said Raymond Coon [state the specific offense threatened with particularity], and has demanded surety of the peace against the said John Doe, and an examination on oath having been taken by me, R. C. Jenyss, police justice, Troy, N. Y., at Troy, N. Y., aforesaid, and it appearing from such examination that there is just cause to fear that said John Doe would carry his said threats into effect,

This is therefore to command you, in the name of the people of the State of New York, forthwith to arrest the said John Doe, and bring him before

me, at the police court, in the city of Troy, to be dealt with according to law.

Given under my hand at the city of Troy, county of Rensselaer and State of New York, January 1, 1882.

R. C. JENYSS,
Police Justice.

No. 10.

Recognizance to keep the peace. (See Code Crim. Proc., § 89.)

POLICE COURT (OR JUSTICES' COURT) OF.....

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

Be it remembered that at the city of Troy, in the county of Rensselaer aforesaid, on this 5th day of January, A. D. 1882, John Doe and John Carpenter, both of the city of Troy, in said county, personally came before me and severally acknowledged themselves to be indebted to the people of the State of New York in the sum of \$1,000, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the following condition:

The condition of this obligation is such, that if the above bounden John Doe personally appear at the next court of sessions to be held in and for the said county of Rensselaer, at the court-house in the city of Troy, in said county, and shall not depart the same without leave, and shall in the meantime keep the peace toward the people of the State and particularly towards Raymond Coon, then this recognizance to be void and of no effect, otherwise to remain in full force and virtue.

JOHN DOE. [L. s.]
JOHN CHRISTIE. [L. s.]

Subscribed and acknowledged before }
me, January 5, 1882. }

R. C. JENYSS,
Police Justice.

No. 11.

Warrant of commitment where the prisoner neglects or refuses to give surety
(See Code Crim. Proc., § 90.)

[Title of Court.]

STATE OF NEW YORK, }
RENSSELAER COUNTY. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable, etc., and to the keeper of the common jail of said county
GREETING:

This is to command you, the said constable, forthwith to convey and deliver to the said keeper the body of John Doe, this day brought before me, and required by me to enter into a recognizance with one sufficient surety in

the sum of one thousand dollars for his personal appearance at the next court of sessions, to be held in and for the said county of Rensselaer, at the courthouse in the city of Troy, and not to depart the same without leave, and in the meantime to keep the peace towards the people of the State of New York, and particularly towards Raymond Coon, who has demanded surety of the peace against John Doe, before me by a complaint in writing and upon oath, the said John Doe having failed to find such surety.

And you, the said keeper, are required to receive the said John Doe into your custody in the said jail of your county, and him there safely keep until he shall find security as aforesaid, or be otherwise discharged by due course of law.

Given under my hand, at the city of Troy, New York, this 10th day of January, 1882.

R. C. JENYSS,
Police Justice.

NO. 12.

A similar warrant when no complaint has been made by the party whose person or property is threatened, but where the offense was committed in the presence of the court or magistrate. (See Code Crim. Proc., § 98.)

[Title of Court, etc.]

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any constable, etc., of said county of Rensselaer, and to the keeper of the common jail, GREETING:

This is to command you, the said constable, forthwith to convey and deliver into the custody of the said keeper, the body of John Doe, charged by me with having, on this 1st day of January, A. D. 1882, at the city of Troy, N. Y., in my presence made an affray with one Raymond Coon [or having threatened to injure the person or property of said Raymond Coon], and the said John Doe having been then and there required by me without other proof to enter into a recognizance in the sum of \$1,000, with one sufficient surety, for his appearance at the next court of sessions, to be held in and for the said county of Rensselaer, at the city of Troy, N. Y., and not to depart the same without leave, and in the meantime to keep the peace toward the people of the State, and especially toward Raymond Coon, the said John Doe having refused to find security.

And you, the said keeper, are hereby required to receive the said John Doe into your custody in the said jail and him there safely keep until he shall find security as aforesaid, or be otherwise discharged by due course of law.

Given under my hand this 10th day of January, A. D. 1882, at Troy, N. Y.

R. C. JENYSS,
Police Justice.

No. 13.

Warrant to release a prisoner committed under either of the foregoing warrants, he having subsequently given the required security. (See Code Crim. Proc., § 91.)

[Title of court.]

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To the keeper of the common jail of said county, GREETING :

This is to command you forthwith to release from your custody the body of John Doe, if detained by you for no other cause than that specified in the warrant of commitment by R. C. Jenyss, police justice of the city of Troy, N. Y., on the 1st day of January, A. D. 1882, for not finding sureties of the peace upon the complaint of Raymond Coon, he, the said John Doe, having since his said commitment found sureties before us; and for your so doing let this be your sufficient warrant.

Witness, R. C. Jenyss and John J. Hassett, police justices of the said city of Troy, Rensselaer county, N. Y., this 1st day of January, 1882.

R. C. JENYSS,
Police Justice.
JOHN J. HASSETT,
Police Justice.

No. 14.

Discharge for want of evidence. (See Code Crim. Proc., § 88.)

POLICE COURT (OR OTHER COURT) OF.....

THE PEOPLE
against
JOHN DOE.

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

Whereas, It appearing that from the evidence and proofs submitted to me on the examination heretofore had herein, that there is not sufficient reason to fear the commission of the crime alleged in the complaint to have been threatened, I do hereby order the said John Doe to be discharged.

Dated, etc.

R. C. JENYSS,
Police Justice.

No. 15.

Return of names of aiders and abettors under the riot act. (Code Crim. Proc., § 104.)

To the Supreme Court of the State of New York :

I, ..., sheriff of
[or other officer], do hereby certify that pursuant to a process of this court duly directed to me for execution on the day of June, 1882, at

Troy, N. Y., in the county of Rensselaer, I attempted to execute said process, but that John Doe, the defendant named in said process, aided and abetted by

 all of the city of Troy, N. Y., did forcibly resist and prevent the legal execution of said process.

All of which is respectfully submitted.

Dated, etc.

JAMES INGRAM,

Sheriff Rens. Co.

No. 16.

Information for warrant—General form. (See Code Crim. Proc., § 145.)

To, one of the justices of the peace [or police justices] in and for the county of Rensselaer [or city of, as the case may be]:

James Dunn, of the town of Grafton, of said county, being duly sworn, says that on the 10th day of June, 1882, at the town of Grafton aforesaid, in said county, John Doe, late of the city of Troy, in said county of Rensselaer, did [here state with particularity the offense charged]. He therefore prays that legal process may be issued, and that the said John Doe be apprehended and held to answer to said complaint, and be dealt with according to law.

Dated at Grafton, in the county of Rensselaer, this 12th day of June, A. D. 1882.

JAMES DUNN.

Subscribed and sworn before me, }
 this 12th day of June, 1882. }

HENRY BURROUGHS,

Justice of the Peace.

No. 17.

Warrant of arrest—General form. (See Code Crim. Proc., § 151.)

STATE OF NEW YORK,
 COUNTY OF RENSSELAER [OR OTHER COUNTY]. } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To any peace officer in this State [or in the county of Rensselaer, as the case may be, as provided in sections 155 and 156]:

Information on oath having this day, by information, been laid before me that the crime of [designating it] has been committed and accusing John Doe thereof.

You are, therefore, commanded forthwith to arrest the said John Doe, and bring him before me, at the police court [or other court], in the city of Troy, N. Y., or in case of my absence or inability to act before the nearest or most accessible magistrate in this county.

Dated at the city of Troy, this 10th day of June, 1882.

R. C. JENYSS,

Police Justice (or justice of the peace, as the case may be).

No. 18.

Affidavit showing handwriting of justice. (Code Crim. Proc., § 157.)

POLICE COURT (OR OTHER COURT).

THE PEOPLE
against
JOHN DOE.

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER.

James Connors, being duly sworn, says that he is acquainted with the handwriting of, the justice who issued the annexed warrant, and that he knows the signature thereto attached to be the genuine signature of said and that the said warrant was issued and signed by said in his presence.

JAMES CONNORS.

Sworn before me, }
June 10, 1882. }

JAMES DUFFY,
Justice of the Peace.

No. 19.

Indorsement upon warrant where the defendant is to be arrested in another county
(See Code Crim. Proc., § 157.)

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER.

Due proof upon oath having been made before me, one of the justices of Rensselaer county, that the name of, purporting to be signed to the warrant of arrest in the handwriting of the said, the justice of the peace in the said warrant named, I do hereby authorize and direct any officer to whom the said warrant is directed to execute the same within the said county of

Dated June 10, 1882.

JAMES DUFFY,
Justice of the Peace, Albany County, N.Y.

No. 20.

Return to warrant of arrest.

I have arrested the within-named defendant, and have him here in my custody as within commanded.

Dated, etc.

GEORGE BROWN,
Constable.

No. 21.

Return where all the defendants cannot be found.

I have arrested the within John Smith and William Marks, and have them here in my custody, but the within-named James Cranch cannot be found.

Dated, etc.

GEORGE BROWN,
Constable.

No. 22.

Return where the magistrate issuing the warrant is absent (See Code Crim. Proc., §§ 164 and 166.)

As within commanded, I have arrested the within-named defendant, and I hereby return that on making the arrest I forthwith brought the said defendant to the office of the magistrate who issued the warrant, but that the said magistrate was absent therefrom.

Dated, etc.

GEORGE BROWN,
Constable.

No. 23.

Return when the magistrate issuing the warrant has gone out of office.

I hereby certify that I have arrested the within named defendant, and that at the time of such arrest, Charles Homer, the magistrate issuing the warrant, had ceased to be such magistrate by the expiration of his term of office [or otherwise].

Dated, etc.

GEORGE BROWN,
Constable.

No. 24.

Warrant after prisoner has escaped or been rescued. (See Code Crim. Proc., § 828.)

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER,

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To [as in No. 17.]

Information upon oath having been this day laid before me by Michael Wallace, a constable of this county, to whom a warrant had heretofore been issued for the arrest of John Doe, that he had arrested the said John Doe by virtue thereof, and that the said John Doe had afterwards at the city of Troy, in said county of Rensselaer, on the tenth day of June, escaped [or been rescued] from the custody of said Wallace. You are, therefore, again commanded to forthwith apprehend the said John Doe, and bring him before me at my office in the village of Lansingburgh, in said county of Rensselaer aforesaid, to be dealt with according to law, or in case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

Dated etc.

R. B. STILES,
Justice of the Peace.

No. 25.

Warrant for the arrest of a fugitive from another State. (Code Crim. Proc., §§ 827, 828.)

[Formal part as in No. 17.]

Information upon oath having been this day laid before me by James Burke that John Doe had committed murder in the State of Vermont on the 10th day of June, 1893, and is now a fugitive from justice in the county of Rensselaer in this state,

You are therefore commanded forthwith to arrest the above-named John Doe and bring him before me at my office in the village of Lansingburgh, N. Y., or in the case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

Dated, etc.

R. B. STILES,
Jus. of the Peace

No. 26.

Form of commitment of fugitives, etc. (See Code Crim. Proc., § 830.)

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER.

The within-named John Doe having been brought before me under this warrant, and it appearing to me that from an examination by me had, that he is guilty of the crime charged, and that he is a fugitive from justice as therein set forth, I therefore commit the said John Doe to the sheriff of the county of Rensselaer [or to the keeper of the common jail] for the space of thirty days [or other reasonable time], or until he shall be discharged by due course of law.

Dated, etc.

R. B. STILES,
Justice of the Peace

No. 27.

Notice to district attorney of commitment of a fugitive from justice. (See Code Crim. Proc., § 833.)

To LAMBERT W. BROWN, *district attorney of Rensselaer county:*

SIR.—Please to take notice that I have this day committed John Doe, a fugitive from justice from the State of Vermont, charged with the crime of murder, committed in said state of Vermont, to the sheriff of Rensselaer county to await the action of the authorities of the State of Vermont aforesaid.

Dated, etc.

Yours, etc.,

R. B. STILES,
Committing Magistrate

No. 28.

Notice to the governor, etc., of the State having jurisdiction of the fugitive.
(Code Crim. Proc., § 883.)

To Hon., Governor of the State of Vermont:

SIR.—The sheriff of Rensselaer county, State of New York, has in charge and subject to your action one John Doe, charged with murder committed within your State on the 10th day of June, 1882. Awaiting your motion, I remain,

Very respectfully yours,

LA MOTTE W. RHODES,

Dist. Atty. of Rens. Co., N. Y.

No. 29.

POLICE COURT (OR OTHER COURT).

Commitment for examination. (Code Crim. Proc., § 198.)

THE PEOPLE against JOHN DOE.

The within named John Doe having been brought before me under the within warrant, is committed for examination to the sheriff of the county of Rensselaer, or in the city and county of New York, to the keeper of the city prison of the city of New York.

Dated, etc.

.....
Jus. of the Peace.

No. 30.

Entry informing prisoner of his right to make a statement. (Code Crim. Proc., § 197.)

At the close of the examination of the witnesses on the part of the people, the defendant was informed of his right to make a statement in relation to the charge against him, as required by section 196 of the Code of Criminal Procedure, and after being so informed he did expressly waive his right to make the same.

.....
Police Justice (or Justice of the Peace).

No. 31.

Statement of defendant—General form. (Code Crim. Proc., § 198.)

Question. What is your name and age? *Answer*.....

Question. Where were you born? *Answer*.....

Question. Where do you reside and how long have you resided there?

Answer.....

Question. What is your business or profession? *Answer*.....

Question. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation? *Answer.*

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 32.

Authentication of statement. (Code of Crim. Proc., § 200.)

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, }
COUNTY OF RENSSELAER. } ss.:

I, R. B. Stiles, a justice of the peace of the county of Rensselaer, do hereby certify that at the close of the examination before me of the witnesses on the part of the people in the above action, I informed the defendant that it was his right to make a statement in relation to the charge against him, and the nature of the charge was stated to him; that the statement was designed to enable him, if he saw fit, to answer the charge, and to explain the facts alleged against him; that he was at liberty to waive making a statement, and that his waiver could not be used against him on the trial; that after being so informed, he made the following statement:

[Here insert questions and answers, as in No. 31.]

That at the close of said statement, I requested said defendant to sign the same, which he refused to do, giving as reasons for such refusal the following, to wit:

[Insert reasons for declining, etc.]

Dated LANINGBURGH, N. Y., June 10, 1882.

R. B. STILES,
Justice of the Peace.

No. 33.

Entry of waiver by Justice. (Code Crim. Proc., § 201.)

After the waiver of the defendant to make a statement, the following witnesses were produced, sworn and examined by and on behalf of the defendant [Insert proceedings had].

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 34.

Testimony, how taken and authenticated. (Code Crim. Proc. § 204.)

JUSTICES' COURT (OR POLICE COURT).

THE PEOPLE
against
JOHN DOE.

Before Justice....., June 10, 1882, Rensselaer county
N. Y.

....., being duly sworn, deposes and says :

Question. What is your name and age ? *Answer*.....

Question. Where do you reside ? *Answer*.....

Question. What is your business or profession ? *Answer*.....

[Insert evidence taken.]

I, R. B. Stiles, justice of the peace, Lansingburgh, N. Y., in said county,
do hereby certify that the above is the testimony given by
a witness sworn on the part of the defendant, who stated his name to be
..... his age to be
his business or profession to be.....

Dated, etc.

.....
Justice of the Peace (or Police Justice).

No. 35.

Indorsement for discharge of prisoner in court. (Code Crim. Proc., § 207.)

Having duly examined witnesses and considered the evidence against the
defendant, John Doe, and there being no sufficient cause to believe him guilty
of the offense charged, I order him to be discharged.

Dated, etc.

.....
Justice of the Peace (or Police Justice).

No. 36.

Order of discharge when defendant is in jail. (Code Crim. Proc., § 207.)

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, } ss. :
RENSSELAER COUNTY. }

To the keeper of the common jail of Rensselaer county :

You are hereby required, on the receipt of this, to discharge from your
custody John Doe, who was committed to jail by me, R. B. Stiles, justice of
the peace of Rensselaer county, charged with the offense of [set out in the
charge].

Dated, etc.

.....
Justice of the Peace (or Police Justice).

No. 37.

Order to commit. (Code Crim. Proc., § 208.)

It appearing to me by the within depositions [and statement if any] that the defendant, John Doe, is guilty of the offense charged, I hereby order that he be held to answer the same.

Dated, etc.

.....
Justice of the Peace.

No. 38.

Order for commitment without bail. (Code Crim. Proc., § 209.)

[Add to No. 37.] And that he be committed to the sheriff of the county of Rensselaer [or in the city and county of New York, to the keeper of the city prison of the city of New York].

Dated, etc.

.....
Justice, etc.

No. 39.

Certificate of bail. (Code Crim. Proc., § 210.)

[Add to No. 37.] And I have admitted him to bail, to answer by the undertaking hereto annexed [or if bail has not been taken], and that he be admitted to bail in the sum of two thousand dollars [or other sum], and be committed to the sheriff of Rensselaer county [or in the city and county of New York, to the keeper of the city prison of the city of New York], until such bail be given.

Dated, etc.

.....
Jus. of the Peace

No. 40.

Indorsement to be made on statement and deposition of defendant in case of prisoner's discharge. (Code Crim. Proc., § 207.)

There being no sufficient cause to believe the within named.....
.....guilty of the offense within mentioned, I order him discharged.

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 41.

Indorsement to be made on deposition and statement of defendant, if crime is bailable and defendant admitted to bail, but bail has not been taken. (Code Crim. Proc., §§ 208, 212.)

It appearing to me by the within depositions and statement, that the crime therein mentioned of arson, has been committed, and that there is sufficient

cause to believe the within-named.....
to be guilty thereof, I order that he be held to answer the same, and that he
be admitted to bail in the sum of.....dollars, and be committed
to the sheriff of the county of Reneselaer, until he give such bail.

Dated, etc.

.....
Justice of the Peace (or Police Justice)

1

No. 42.

Indorsement to be made on deposition and statement of defendant if believed guilty. (Code Crim. Proc., §§ 208, 209.)

It appearing to me by the within depositions and statement that the crime
therein mentioned has been committed, and that there is sufficient cause to
believe the within-named.....guilty thereof, and
I hereby order that he be held to answer the same.

Dated, etc.

.....
Justice of the Peace (or Police Justice).

No. 43.

*Indorsement to be made on depositions and statement of defendant, if crime be bail-
able and bail be taken. (Code Crim. Proc., §§ 208, 210.)*

It appearing to me by the within depositions and statement that the crime
therein mentioned of.....has been committed, and that
there is sufficient cause to believe the within named.....to be
guilty thereof, I order that he be held to answer the same, and I have
admitted him to bail by the annexed undertaking.

Dated.....

.....
Police Justice (or Justice of the Peace).

No. 44.

*Indorsement to be made on defendant's deposition and statement, if believed guilty
and crime be not bailable. (Code Crim. Proc., §§ 208, 209.)*

It appearing to me by the within depositions and statement that the crime of
murder has been committed, and that there is sufficient cause to believe the
within named..... to be guilty thereof, I do hereby order
that he be held to answer the same, and that he be committed to the sheriff of
the county of Reneselaer.

Dated.....

.....
Police Justice (or Justice of the Peace).

No. 45.

Commitment for further examination.

POLICE COURT (OR JUSTICES' COURT).

The sheriff of Rensselaer county will receive and safely keep within the common jail of said county for further examination..... charged before me with the offense of [set forth briefly the offense].

Dated, etc.

.....
Police Justice (or Justice of the Peace).

No. 46.

Undertaking to appear before magistrate issuing warrant taken in another county.
 (Code Crim. Proc., § 159.)

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

We,.....of.....in the county of.....by occupation a....., defendant, and.....of.....in the county of.....by occupation a.....and.....of.....in the county of.....by occupation a.....sureties, acknowledge ourselves to owe the people of the State of New York each the sum of.....dollars, to be made and levied out of our respective goods and chattels, lands, tenements, to the use of the said people if default shall be made on the conditions following :

The condition of this recognizance is that, whereas, information has been made on oath, before.....one of the justices of the peace [or police justices] of the county of Rensselaer, that on the.....day of.....1882, in said county, the crime of.....was committed, and accusing.....thereof ;

And, whereas, the said.....justice of the peace [or other justice] as aforesaid, did, on the.....day of....., 1882, duly issue a warrant for the arrest of said.....;

And, whereas, the said.....has been duly arrested in the county of Saratoga, and having required the officer making the arrest to take him before a magistrate in the said county of Saratoga, he has this day been duly brought before me, the undersigned, one of the justices of the peace of said county of Saratoga ;

Now, therefore, if the said.....shall personally appear before the said.....justice of the peace [or police justice] aforesaid, at his office [or police court-room] in the city of....., county of....., on the.....day of....., 1882, at.....o'clock, A. M., on that day, then this recognizance to be void, otherwise to remain in full force and effect, and we, the said sureties, will pay to the people of the State of New York the sum of.....

(Signed)

Taken and subscribed before me, }
 this.....day of..... }

.....
Justice of the Peace.

STATE OF NEW YORK, } ss. :
 COUNTY OF,

..... of said county, being duly sworn, doth depose and say that he is worth dollars, over and above all debts, dues, demands and liabilities whatever, and that his property consists of

Subscribed and sworn before me, }
 this....day of.....1883. }

.....
Justice of the Peace (or other Justice).

STATE OF NEW YORK, } ss. :
 COUNTY OF,

..... of, in said county, being duly sworn, doth depose and say that he is worth dollars, over and above all debts, dues, demands and liabilities whatever, and that his property consists of

Subscribed and sworn before me, }
 this....day of.....1883. }

.....
Justice of the Peace.

No. 47.

Bond for adjournment. (Code Crim. Proc., § 192.)

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
 COUNTY,

We, ..., of No..... street, a holder, and of No..... street, a holder, residents of the city of, in said county, acknowledge ourselves to be indebted to and owe the people of the State of New York each the sum of.....hundred dollars, to be respectively made and levied of our several goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that whereas, information has been made on oath before....., one of the justices of the peace [or other justice] of the county of [or city of] Rensselaer, that the offense of has been committed and accusing said thereof, and said..... has been duly arrested and held for examination.

Now, therefore, if the said shall personally appear before justice as aforesaid, at his office [or police court] in the city [or town of] on the day of 1882, at ten o'clock A. M. of that day, to be examined for the offense afore-

said; and to do and receive what shall by the said justice be then and there enjoined upon him; and shall appear during such examination, and shall not depart the said court without leave, then this recognizance to be void, otherwise, we, the said bail, will pay the people of the State of New York the said sum of dollars.

Taken, subscribed and acknowledged }
before me, this....day of 1882. }

Justice of the Peace (or other Justice).

[Affidavits of sureties as in No. 46.]

No. 48.

Undertaking to grand jury in cases triable by special sessions. (Code Crim. Proc., § 211.)

..... COUNTY, }
JUSTICES' COURT [OR OTHER COURT], } ss.:

.....having been duly charged on information before.....a justice of the peace of the town of..... county of, with the offense of.....and the said justice having informed him of his right to be tried by a jury after indictment, and did ask him how he would be tried, and he requiring to be tried by a jury after indictment; and after having so required to be tried the said justice did hold said..... to answer to the next court to be held in and for the said county of, having authority to inquire by the intervention of a grand jury into offenses triable in said county of

We,..... of.....in the.....of..... by occupation a.....and.....of.....in the..... of by occupation a and.....of..... in the.....of.....by occupation a undertake that said.....shall appear and answer the charge above mentioned at the next court, to be held in and for the county of, having authority to inquire, by the intervention of a grand jury, into offenses triable in the said county of, and shall at all times render himself amenable to the process of the court; and if convicted, shall appear for judgment, and render himself in execution thereof; or, if he fail to perform either of these conditions, that we will pay to the people of the State of New York the sum of hundred dollars.

Dated the.....day of....., 1882.

(Signed)

Taken, subscribed and acknowledged before me, }
the day and year last above mentioned. }

Justice of the Peace (or other Justice).

[Affidavits of sureties as in No. 46, ante.]

No. 50.

Form of commitment. (Code Crim. Proc., § 214.)

COUNTY OF RENSSELAER, ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
*To the sheriff of the county of Rensselaer [or in the city and county of New York
 "to the keeper of the city prison of the city of New York"]:*

An order having been this day made by me that John Doe be held to answer to the court of upon a charge of [state the nature of the crime], you are commanded to receive him into your custody, and detain him until he be legally discharged.

Dated, etc.

.....

Justice of the Peace.

No. 51.

Undertaking of witness to appear without sureties. (Code Crim. Proc., § 215.)

Know all men by these presents, that I, John Doe, am held and firmly bound unto the people of the State of New York, in the sum of dollars, to be paid to the people of the State of New York; for which payment, well and truly to be made, I bind myself, my heirs, executors, administrators and assigns, jointly and severally by these presents.

Dated this day of, 1882.

The condition of this obligation is such that if the above-named John Doe shall duly appear as a witness when properly summoned, on the trial of a certain action, wherein the people of the State of New York are plaintiffs, and is defendant, on a charge of arson, and shall give his evidence therein on behalf of the said people, then this obligation shall be void and of no effect, otherwise to remain in full force and effect, and the said John Doe will pay to the people of the State of New York the said sum of one hundred dollars.

JOHN DOE.

STATE OF NEW YORK, }
 COUNTY OF, } ss.:

On this day of, in the year one thousand eight hundred and, before me, the subscriber, personally came to me known to be the person described in and who executed the within instrument, and acknowledged that he executed the same.

.....

Justice of the Peace.

No. 52.

Surety for appearance of witness. (Code of Crim. Proc., § 216.)

JUSTICES' COURT (OR OTHER COURT).

THE PEOPLE
against
JOHN DORING.

}

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY.

The above named defendant having been arrested charged with the crime of arson, and having been held to answer on the deposition and evidence of John Doe, before Justice R. B. Stiles of Lansingburgh, N. Y., and the said justice being satisfied by proof on oath, that said John Doe intends to depart the State and not to appear and testify at the trial of this cause, and the said justice having required an undertaking with sureties, for his appearance at such trial:

Be it remembered, that on this.....day of.....188 ,
.....of.....in the county
of.....by occupation a....., and.....
of.....in the county of.....by occupation a.....,
and.....of.....in the county
of.....by occupation a.....sureties, personally came
before me.....justice of the peace of the county of
Rensselaer, and acknowledged himself, each, to be indebted to the people of
the State of New York, in the sum of.....hundred dollars, to be made
and levied of his goods and chattels, lands and tenements, to the use of the
said people, if default shall be made in the condition following:

The condition of this recognizance is such that if the bounder.....
.....shall personally appear and testify
at the next court.....
to be held in and for the said city or county of to give evidence as a
witness on behalf of the said people, against.....
arrested and held to answer the charge of.....
.....
as well to the grand jury as to the petit jury, and do not depart the said court
without leave, then this recognizance to be void and of no effect; otherwise
to remain in full force and virtue. The said sureties will pay to the people of
the State of New York, the said sum of.....hundred dollars.

Dated.....day of....., 188 .

(Signed)

.....

STATE OF NEW YORK, } ss.:
COUNTY OF.....

On this day of, 18.., before me, the subscriber,
personally appeared.....
to me known to be the same persons described in and who executed the above
undertaking, and severally acknowledged that they executed the same.

.....

Justice of the Peace.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

..... and
being severally sworn, each for himself says, the said.....
that he is a.....of the county of.....in this State, and
that he is worth the sum of.....dollars over and above
all debts and liabilities which he owes or has incurred, exclusive of property
exempt by law from levy and sale under an execution; and the said, ..
..... for himself, says that he is a of the county
of.....in this State, and that he is worth the sum of.....
.....dollars over and above all debts and liabilities which he owes or
has incurred, exclusive of property exempt by law from levy and sale under
an execution.

Severally subscribed and sworn to, before me, }
this.....day of.....18.. }

Justice of the Peace.

I certify that I find the sureties in the foregoing undertaking sufficient, and
do approve of the same.

Justice of the Peace.

No. 53.

Order that witness give security for appearance. (Code Crim Proc., § 216.)

JUSTICES' COURT (OR OTHER COURT).

THE PEOPLE
against

Whereas, ... a witness examined before me, on the part of
the people, in the above action, is a material witness for the people therein ;
And, whereas, I am satisfied, by proof on oath, that there is reason to
believe that the said..... will not appear and testify on the
part of the people, at the next court of..... to be held in and
for the county of..... on the day of..... 1882,
to which the statements and depositions in the above action are to be sent, I
do hereby order that the said..... enter into a written under-
taking in the sum of..... with..... sureties that he will
appear and testify on the part of the people at said next term of the court.

(Signed by justice.)

Dated, etc.

No. 54.

Commitment of witness who has refused to give an undertaking to appear and testify. (Code Crim. Proc., § 218.)

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the sheriff of the county of (or to the keeper of the city prison in the city and county of New York).

Whereas, It is made to appear to me, R. B. Stiles, a justice of the peace of Lansingburgh, N. Y., on the oath of good and sufficient witnesses, that John Doe is a material witness in a matter wherein James Doring is accused by the people of the State of New York of the crime of arson [state facts and circumstances], and that the said John Doe is about to leave the State, as he is satisfied by due proof on oath, to avoid being called as a witness on the part of the people therein;

And, whereas, The said John Doe refuses, as required by me, to enter into an undertaking in the sum of one hundred dollars, for his personal appearance at court, when duly subpoenaed to give evidence on behalf of the people against said James Doring,

You are therefore commanded to receive the said John Doe, and detain him in your custody until he shall give the security required, or be otherwise legally discharged.

Dated, etc.

R. B. STILES,
Justice of the Peace, Lansingburgh, N. Y.

No. 55.

Warrant of commitment when witness refuses to furnish sureties. (Code Crim. Proc., § 218.)

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

Whereas, It has been made to appear on the oath of good and sufficient witnesses that John Doe is a material witness in a matter wherein the people of the State of New York are plaintiffs, and James Doring, the defendant, is accused by the said plaintiffs of the crime of arson [state facts and circumstances], and that the said John Doe is about to leave the State to avoid giving his testimony at the trial thereof, at the instance of the said people, and whereof the said John Doe refuses, as required by me, to give security, as fixed by me, for his appearance at the trial of the said cause when duly subpoenaed. Now you are hereby commanded to receive the said John Doe into your cus-

body, and detain him until he gives the required security, or is otherwise legally discharged.

Dated, etc.

R. B. STILES,

Justice of the Peace, Lansingburgh, N. Y.

No. 56.

Oath of foreman of grand jury. (Code of Crim. Proc., § 245.)

You, as foreman of this grand jury, shall diligently inquire, and a true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this State, your fellows and your own you shall keep secret; you shall present no person from envy, hatred or malice; nor shall you leave anyone unrepresented through fear, favor, affection or reward, or hope of thereof, but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God!

No. 57.

Oath of grand jurors. (Code Crim. Proc., § 246.)

"The same oath which your foreman has now taken before you, on his part, you and each of you shall well and truly observe on your part. So help you God!"

No. 58.

Order to draw grand jury. (Code Crim. Proc., § 227.)

IN THE MATTER OF DRAWING GRAND
JURORS, &c.

At a special term of the supreme court, held at the chambers of Hon.
.....in the city of....., on the.....

Present — Hon. Court.

It is hereby ordered that the clerk of draw according to law a grand jury to serve at the next court of sessions of Rensselaer county, to be held at the court-house on the 25th day of June, 1893.

Dated June 1, 1893.

.....
.....

No. 59.

Order of board of supervisors to draw grand jury. (Code Crim. Proc., § 227.)

At a regular meeting of the board of supervisors of Rensselaer county, held in the city of Troy on the 1st day of June, 1882, it was, by unanimous consent,

Resolved, That....., the clerk of Rensselaer, be and he is hereby ordered to draw, according to law, a grand jury to serve at the next court of sessions of Rensselaer county, to be held at the court-house in the city of Troy, on the day of June, 1882.

Dated June....., 1882.

.....
Chairman of Board of Supervisors, Rensselaer County.

No. 60.

Indorsement of clerk upon copy of order for drawing grand jury. (Code Crim. Proc., § 227.)

I, ..., clerk of the board of supervisors of Rensselaer county, hereby certify that the within is a faithful copy of an order issued by the board of supervisors, passed June 1, 1882, and the whole thereof.

.....
Clerk of Board, etc.

No. 61.

General form of indictment. (Code Crim. Proc., § 276.)

COURT OF (AS THE CASE MAY BE).

THE PEOPLE OF THE STATE OF NEW YORK
 against
 JOHN DOE.

The grand jury of the county of Rensselaer [or of the city or city and county in which the indictment is found], by this indictment accuse John Doe of the crime of [here insert the name of the crime, if it have one, otherwise give a brief description as given by statute], committed as follows:

The said John Doe, on the 10th day of June, 1882, at the town [city or village] of Lansingburgh, in this county [here set forth with particularity the act charged as an offense].

.....
District Attorney of county.

No. 62.

Bench warrant. (Code Crim. Proc., § 301.)

COUNTY OF RENSSELAER (OR OTHER COUNTY), ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To any peace officer in this State:

An indictment having been found on the 10th day of June, 1882, in the court of oyer and terminer [or other case], charging John Doe with the crime of [here describe the crime generally.]

You are therefore commanded forthwith to arrest the above named John Doe and bring him before that court [or if the indictment has been removed, before the court to which it is removed] to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of Rensselaer [or as the case may be].

City [or town] of the day of 1883.

By order of the court.

.....
Clerk.

No. 63.

Bench warrant in cases of misdemeanors. (Code Crim. Proc., § 802.)

[Insert in the body of No. 62.] "Or if he require it, that you take him before any magistrate in that county or in the county in which you arrest him, that he may give bail to answer the indictment."

No. 64.

Indorsement on warrant in a bailable case. (Code Crim. Proc., § 803.)

The defendant herein is to be admitted to bail in the sum of dollars.

By order of the court.

.....
Clerk

No. 65.

Indorsement of taking bail on bench warrant. (Code Crim. Proc., § 803.)

Whereas, It appears from the within bench warrant that the crime is bailable, now it is hereby ordered by the court that the defendant be admitted to bail in the sum of... dollars.

.....
Clerk.

No. 66.

Affidavit to set aside indictment. (Code Crim. Proc., § 812.)

COURT OF OYER AND TERMINER.

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY.

Jacob Hart, being duly sworn, says that he is the attorney for the above named defendant, and that he has examined the indictment presented to this court by the grand jury at the present term, charging the said defendant with

the crime of arson; that said indictment, when returned to this court, was indorsed "a true bill," but was not signed by the foreman of the grand jury as required by section 268 of the Code of Criminal Procedure. Deponent further says that, the district attorney of this county, was present in the room at the time when the members of said grand jury were giving their votes on said indictment.

JACOB HART.

Sworn before me, }
Junc 10, 1893. }

GEORGE A. MOSHER,
Commissioner of Deeds, Troy, N. Y.

No. 67.

Order setting aside indictment. (Code of Crim. Proc., § 817.)

COURT OF OYER AND TERMINER.

PEOPLE OF STATE OF NEW YORK
against
JOHN DOE.

At a special term of the supreme court of the State of New York, held, etc.
On reading and filing the affidavit of James Hart, in support of a motion to set aside the indictment in the above entitled action, and after hearing said Hart in support of said motion, and Hon., district attorney of county, opposed thereto, and it appearing that the irregularities set forth in said affidavit are true, it is hereby ordered that said indictment be and the same is hereby set aside, and that said defendant be discharged from custody and his bail be exonerated [or that the case be again submitted to the grand jury for consideration].

By order of the court.

Dated, etc.

.....
Clerk.

No. 68.

Order of discharge if new indictment is not found by next grand jury. (Code Crim. Proc., § 819.)

[Formal part as in No. 67.]

It appearing to the satisfaction of the court that the indictment of John Doe was set aside at the last term of this court, and the present grand jury having been discharged without finding a new indictment against said John Doe, now on motion of James Hart, his attorney, it is hereby ordered that he be discharged from custody and his bail be exonerated.

By order of the court.

Dated, etc.

.....
Clerk.

No. 69.

Demurrer to indictment. (Code Crim. Proc., § 324.)

COURT OF OYER AND TERMINER. — County.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

}

The defendant John Doe, above named, demurs to the indictment presented by the last grand jury, on the 10th day of June, 1892, charging him with the crime of arson, on the following grounds:

First. That the crime set forth in the indictment was committed in the county of Albany, and was not within the jurisdiction of this court.

Second. The facts stated in said indictment do not constitute a crime.

Wherefore this defendant asks judgment of the court that he be dismissed and discharged from the said premises specified in the said indictment.

Dated, etc.

CHARLES H. MILLS,
Attorney for Defendant.

No. 70.

Answer to demurrer

COURT OF OYER AND TERMINER. — County of

THE PEOPLE
against
 JOHN DOE.

}

....., who prosecutes for the people, says that the said indictment and the matter therein contained in manner and form, as the same are there stated, are sufficient in law to compel the said John Doe to plead to the same; wherefore the said people as the judgment of the court herein, that the said defendant be ordered to plead to said indictment, and proceed to trial under the same.

.....
District Attorney, of County

No. 71.

Plea of guilty. (Code Crim. Proc., § 324.)

COURT OF OYER AND TERMINER. — County.

THE PEOPLE
against
 JOHN DOE.

}

The defendant herein, being duly arraigned, pleads that he is guilty of the crime charged in the indictment.

No. 72.

Plea of guilty of lesser crime.

[Formal part as in No. 69.] The defendant on being arraigned on the indictment charging him with an assault with intent to kill, pleads guilty of the crime of a simple assault.

No. 73.

Plea of not guilty.

[Formal part as in No. 69.] The defendant, on being arraigned, pleads not guilty to the crime charged in the indictment.

No. 74.

Plea of former conviction or acquittal.

[Formal part as in No. 69.] The defendant herein, on being arraigned, pleads that he has already been acquitted [or convicted] of the crime charged in this indictment by the judgment of the court of special sessions [or other court], rendered at Troy, N. Y., on the 10th day of June, 1883.

No. 75.

Plea of insanity.

[Formal part as in No. 69.] The defendant herein, John Doe, on being arraigned on the indictment charging him with the crime of arson, pleads not guilty thereto, and also further pleads that, at the time or times charged in the indictment, he was of unsound mind and wholly irresponsible for his acts.

No. 76.

Challenge to the panel. (Code Crim. Proc., § 308.)

COURT OF OYER AND TERMINER—..... COURT.

THE PEOPLE OF THE STATE OF NEW YORK
against
 JOHN DOE.

The defendant, John Doe, hereby challenges the panel returned for present term of this court, on the following grounds :

First. That the sheriff of county intentionally omitted to summon John K. Burns, of Lansingburgh, who was regularly drawn as a juror for the present term of this court.

Second. [State any respect in which the drawing and return of the jury was not according to the forms of the Code of Civil Procedure, whereby the defendant was prejudiced.]

Dated, etc.

.....

Attorney for Defendant.

No. 77.

Challenge for actual bias. (Code Crim. Proc., § 380.)

COURT OF OYER AND TERMINER—RENSSELAER COUNTY.

THE PEOPLE
against

}

The defendant herein challenges..... a juror drawn to serve in this case, on the ground that said juror possesses such a state of mind regarding this case, and especially this defendant, that such juror cannot try the case impartially, and will greatly prejudice the substantial rights of this defendant.

.....

Attorney for Defendant.

No. 78.

Challenge for implied bias. (Code Crim. Proc., § 380.)

[Formal part as in No. 75.]

The defendant herein challenges John Doe, a juror drawn to serve on the present case, on the following grounds :

First. That the said John Doe is related to the person alleged to have been injured by the commission of the crime charged in this indictment within the sixth degree of consanguinity.

Second. That said John Doe served on the jury which found this indictment.

.....

Defendant's Attorney.

No. 79.

Form of special verdict. (Code Crim. Proc., §§ 438, 440.)

COURT OF OYER AND TERMINER

THE PEOPLE OF THE STATE OF NEW YORK
against
JOHN DOE.

}

We, the jurors in the above cause, find the following facts as established by the evidence submitted for our consideration:

First. We find that, as charged in the indictment, John Doe set fire to the building named therein.

Second. That said fire occurred between the hours of seven and eight o'clock A. M. of the 10th day of June, 1882.

Third. That said building was not used or occupied as a dwelling-house, and that at the time of said burning no human being was therein.

Dated, etc.

(Signed by jurors.)

No. 80.

Notice of argument on special verdict. (Code Crim. Proc. § 441.)

COURT OF OYER AND TERMINER—RENSELAIRE COUNTY.

THE PEOPLE, Etc.,
 against
 JOHN DOE.

To, Esq., *District Attorney*:

SIR—Please to take notice that the special verdict rendered in the above cause on the 6th day of June, 1882, will be brought to argument at the present term of this court, on the 15th day of June, 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated TROY, N. Y., June 9, 1882.

Yours, etc.,

SMITH & WELLINGTON,

Attorneys for Defendant.

No. 81.

Information for false pretenses.

STATE OF NEW YORK, }
 COUNTY OF RENSSELAIRE. } ss.:

....., being duly sworn, says that he resides in the city of Troy, N. Y.; that on the.....day of.....1882, at said city of Troy, N. Y., one....., with intent feloniously to cheat and defraud the....., did then and there feloniously, unlawfully and designedly pretend and represent to the said.....that [here state the facts and circumstances comprising the false representations] and the said.....then and there believing the said false pretenses and representations so made as aforesaid, by the said....., and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid to deliver and did then and there deliver to the said.....of the value of.....dollars, of the proper moneys, valuable things, goods, chattels and personal property, and effects of the said.....and the said.....did then and there receive and obtain the said.....of the value of.....dollars from the said.....of the proper moneys, valuable things, goods, chattels and personal property and effects of the said.....by means of the false pretenses and representations aforesaid, with intent feloniously to cheat and defraud the said.....of the value of.....dollars; that in fact and in truth the pretenses and representations so made as aforesaid by the said.....to the said.....was and were in all respects utterly false and untrue; that in fact and truth the said.....well knew the said pretenses and representations as by him made as aforesaid to the said.....to be utterly false and untrue at the time of making the same.

That the said....., by means of the false pretenses and representations aforesaid, feloniously, unlawfully, falsely, knowingly and designedly did receive and obtain from the said.....
of the value of.....dollars of the proper moneys, valuable things, goods, chattels and personal property and effects of the said....., with intent feloniously to cheat and defraud the said.....of the same.

.....
 Taken, subscribed and sworn to before me, }
 this.....day of....., 188.. }

.....
Police Justice (or Justice of the Peace)

No. 82.

Information for misdemeanor.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides in the city of Troy, N. Y., in said county; that, on the.....day of....., 1882, at Troy aforesaid, one.....did unlawfully and knowingly violate.....Laws of the State of New York,.....relating to in that he did [here set out the facts and circumstances constituting the breach].

.....
 Subscribed and sworn before }
 me, June, 1882. }

.....
Justice of the Peace (or Police Justice).

No. 83.

Information relative to dog fighting.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

....., being duly sworn, deposes and says, that he resides in the.....of.....; that on the.....day of.....188.., at the.....of....., one.....did willfully, unlawfully and wickedly encourage, aid and assist one.....to keep a certain place, to wit:.....or to receive money for the admission of divers persons to a certain place.....for the purpose of, and such place was then and there, by the aid of the said.....unlawfully

kept and used by the said.....for the purpose of fighting, baiting certain bulls, bears, dogs, cocks or other creatures, to wit:

Sworn before me, the..... }
day of....., 1892. }

Police Justice (or Justice of the Peace).

No. 84.

Information for bigamy.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

....., being duly sworn, deposes and says, that he resides in the.....of.....; that one....., on the.....day of....., at the.....of....., did marry one.....and....., the said.....did them and there have for.....and that the said.....being so married afterwards, to wit, on the.....day of....., with force and arms, at the.....of....., in the county of....., feloniously did marry and take as.....one....., and to the said.....was then and there married. the said.....being then and there living and in full life.

Subscribed and sworn before me, }
the.....day of....., }

No. 85.

Information for an affray.

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides at Troy, N. Y., in said county; that on the.....day of....., 1892, at the said city of Troy, in said county,.....did, with force and arms, make an affray by fighting with.....in a public place, to wit, ...against the peace of the people and the form of the statute in such case provided.

Subscribed and sworn before me, }
..... }

No. 86.

Information for assault and battery.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides at Troy, N. Y., in said county; that on the.....day of, at said city of Troy, one, with force and arms, did make an assault upon this deponent, and him, the said deponent, did then and there beat, wound and ill-treat, without cause or provocation, by.....

Subscribed and sworn before me, }
 this.....day of..... }

.....

.....

No. 87.

Information against keeper of bawdy house.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides in; that the premises known as No. street in said city of were, on the day of, 1882, kept, maintained and occupied by..... as a common, ill-governed and disorderly house, and common bawdy house and house of prostitution, and a resort for tipplers, drunkards, common prostitutes and reputed thieves, with other vile, wicked, idle, dissolute and disorderly men and women and reputed thieves, who, or most of whom, are in the practice of drinking, dancing, quarreling, fighting, whoring, rioting, disturbing the peace, cursing and swearing at almost all hours of the day and night, to the great damage and common nuisance of the people of the State of New York, there inhabiting, residing in the neighborhood, and passing thereby; that the grounds of deponent's knowledge are [here state grounds of deponent's knowledge and belief].

Sworn before me, }
 June .., 1882. }

.....

.....

No. 88.

Information for violating city ordinances.

STATE OF NEW YORK, } ss.:
 COUNTY OF RENSSELAER. }

....., being duly sworn, says that he resides in the city of Troy, Rensselaer county, N. Y.; that on the.....day of.....,

1883, in said city of Troy, one did willfully and unlawfully violate chapter..... of title..... of the laws and ordinances of the city of Troy aforesaid, relating to [give title to the ordinance violated] in that he did [set up the facts and circumstances constituting the offense].

Sworn before me, this, ... }
day of.....1883. }

.....

.....

No. 89.

Information for breach of the peace.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

....., being duly sworn, says that he resides.....; that on the..... day of.....one.....did make a breach of the peace by quarreling, fighting and making a large noise, and collecting a crowd in.....street of the city of Troy.

Subscribed and sworn before me, }
this.....day of.....1883. }

.....

.....

No. 90.

Information for assault on an officer.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

....., being duly sworn, deposes and says that he.....; that on the.....day of....., 188., at the city of Troy, in said county, one with force and arms, in and upon one.....he then and there being a.....patrolman, policeman and police officer of the police force of the said city of Troy, and a police officer and a peace officer of, in and for the said city of Troy, unlawfully and violently, without justifiable or excusable cause, did assault, beat, bruise, wound and use personal violence upon, and him evil treat, while he, the said.....so being a.....patrolman, policeman, police officer and peace officer aforesaid, was then and there lawfully engaged in the discharge of his duties as such patrolman, policeman, police officer and peace officer of said police force, and of the said city of Troy, and him, the said.....patrolman, policeman, police officer and peace officer as aforesaid, did unlawfully and willfully resist in the discharge of his duties as such.....patrolman, policeman, police officer and peace

officer, against the peace of the people of the State of New York, and the form of the statute in such case provided by.....

Sworn before me, the }
day of..... }

.....

No. 91.

Information for acts tending to create a breach of the peace.

STATE OF NEW YORK, } ss. .
 RENSSELAER COUNTY. }

....., being duly sworn, deposes and says that he resides.....; that on the.....day of in said city [or town] one.....did [here set forth the acts creating the breach] which had a tendency to excite others and them to create a breach of the peace against the people of the State of New York, and the form of the statute in such case made and provided.

Subscribed and sworn before me, }
 this.....day of.....1883. }

.....

No. 92.

Information for perjury.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

..... being duly sworn, deposes and says that he resides in the.....of.....that on the.....day of.....188..instant, at the.....of.....in the county of.....a certain action in which.....was plaintiff and.....was defendant, was.....before.....and that upon the of said action.....appeared as a witness for and on behalf of the said.....and was then and there duly and regularly sworn by the said.....as such that the evidence he should give relating to the matter in difference between the said parties should be the truth, the whole truth and nothing but the truth; and that upon the.....of the said action it then and there became material to inquire whether.....and that thereupon the said.....being so sworn as a witness as aforesaid, did then and there on the.....of said action falsely, willfully and corruptly depose, swear and testify, among other things, that.....whereas, in truth and in

fact, the
 whereby the said.....did then and there willfully and corruptly
 swear falsely and commit willful and corrupt perjury.

Subscribed and sworn before me, }
 this....day of.....1883. }

.....

No. 93.

Information for arson, first and second degrees.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

.....being duly sworn, deposes and says that
 he resides in the.....of.....that in the.....time
 of the.....day of.....188.. one.....did
 willfully set fire to or burn a certain dwelling-house, to wit.....
in the.....of.....
 in which there was at the time human beings, to wit.....
by.....

Subscribed and sworn before me, }
 the....day of....., 1883. }

.....

No. 94.

Information for arson, second and third degrees.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY. }

.....being duly sworn, deposes and says that he resides
 in the.....of.....that in the.....time of the.....
 day of.....188..in the.....of.....one.....
 did willfully set fire to or burn a shop, warehouse or other building, to wit.....
in which there was not at the time a human being; said
adjoined to or was within the curtilage of an inhabited
 dwelling-house, to wit: so that the said house was endan-
 gered by such firing; in that said..... did.....

Subscribed and sworn before me, }
 this....day of....., 1883. }

.....

No. 95.

Information for refusing to aid an officer.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY.

.....being duly sworn says that he resides in the city [or town] of.... that on the.....day of.....at said city [or town] (f. in said county.....did willfully and unlawfully disobey the command and request of.....the said.....being at the time a.....patrolman, policeman and police officer of the police force of the said city [or town] of, and a police officer and peace officer of, in and for the said city [or town] of.....and an officer authorized to execute criminal process; and the said.....having as such officer, then and there commanded the assistance of the said.....in securing and conveying to the.....one.....of the of.....aforesaid, that had then and there been duly arrested by the said.....policeman, and police officer as aforesaid, against the peace of the people of the State of New York, and the form of the statute in such case provided.

Subscribed and sworn before me, }
 this....day of.....1882. }

.....

No. 96.

Information for interfering with an officer.

STATE OF NEW YORK, } ss.:
 RENSSELAER COUNTY.

.....being duly sworn, deposes and says that he is a policeman in said city of Troy; that on the day of, 188., at the city of Troy, in said county, ..., with force and arms, did unlawfully, designedly and feloniously, forcibly interfere with, he then and there being a member of the police force of the city of Troy, to wit, a policeman, ... and having in legal custody one, upon a criminal charge, to wit, upon the charge of, committed by him, the said, upon one, by [state the nature of the offense].

Subscribed and sworn before me, }
 the day of, 1882. }

.....

No. 97.

Information for larceny.

STATE OF NEW YORK, }
 RENSSELAER COUNTY. } ss.:

....., being duly sworn, says he resides at; that on the day of, 1882, in said city [or town] aforesaid, divers goods, chattels, money and property of deponent, of the kind, description and value as follows, to wit [give description and value with particularity], were feloniously taken and stolen and carried away from the possession of deponent by one John Doe, by [give manner of the taking].

Sworn before me, this }
 day of, 1882. }

No. 98.

Information for burglary, first degree and larceny.

STATE OF NEW YORK, }
 RENSSELAER COUNTY. } ss.:

....., being duly sworn, deposes and says that he resides in the.....of.....; that on the.....day of....., 188...., at the city of..... in said county,.....with force and arms, about the hour of.....in the night-time of the same day, the dwelling-house of another, to wit, of one.....there situate, feloniously and burglariously did break into and enter by forcibly bursting and breaking an outer door of the said dwelling, or by.....in which said dwelling-house there was then at the same time some human being, to wit,....., with intent feloniously and burglariously to commit some crime therein, to wit, then and there the goods and chattels of the said.....in the said dwelling-house then and there being, and then and there feloniously and burglariously to steal, take and carry away, and.....of the value of.....dollars, of the goods, chattels and property of the said.....in the said dwelling-house then and there being, feloniously, burglariously, did steal, take and carry away by.....

Taken, subscribed and sworn to before me, }
 this.....day..... }

No. 99.

Information for larceny from the person.

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the.....of.....; that on the.....day of..... 188....., at the city of....., in said county,.....with force and arms, from the person of.....of the value of.....dollars, of the goods, chattels and personal property of the said..... then and there being found, feloniously did steal, take and carry away by [give manner of the carrying away].

Subscribed and sworn before me, }
 this.....day of..... }

No. 100.

Information for robbery, first degree.

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

....., being duly sworn, says that he resides at; that, on the.....day of....., at the city [or town] of....., in said county,.....with force and arms, in and upon one....., then and there being, feloniously did make an assault, and him, the said..... did then and there feloniously put in fear of some immediate injury to his person and in danger of his life, did then and there feloniously and violently steal, take and carry away from the person, and against the will of the said value of.....dollars, of the goods, chattels and property of the said by [state the manner of taking].

Sworn and subscribed to before me }
 this.....day of..... }

No. 101.

Information for burglary and larceny.

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the.....of.....; that, on the..... day of....., 188..., at the city of....., in said county, ...with force and arms, the.....

of one.....there situate, feloniously and burglariously did break into and enter, the same being a as above, in which divers goods and merchandise and valuable things were then and there kept for use, sale and deposit, to wit, the goods and chattels of the said in said.....as above, then and there being, then and there feloniously and burglariously to steal, take and carry away.....of the value of.....dollars, of the goods and chattels and property of the said.....in the said.....as above, so kept as aforesaid, then and there being feloniously and burglariously did steal, take and carry away by [state the manner of taking].

Taken, subscribed and sworn to before me }
 this day of }

.....

No. 102.

Information for receiving stolen goods.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, says that he resides in the of; that, on the day of, 188., at the city of, in said county, ..., being a person of evil name and fame and dishonest conversations, and common buyer and receiver of stolen goods, with force and arms, ... of the value of dollars, of the goods and chattels of..... by, then lately before feloniously stolen of the said, unlawfully, unjustly and for the sake of wicked gain, did feloniously receive and have the said, then and there well knowing the said goods and chattels to have been feloniously stolen; that the facts upon which this affidavit is based are as follows: [State the facts and circumstances.]

Subscribed and sworn to before me, }
 this day of }

.....

No. 103.

Information for embezzlement.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that on or about the day of 188., at the city of

In said county, one, being a servant or agent of
, and not an apprentice, nor within the age of
 eighteen years, did feloniously embezzle and convert to his own use, without
 the assent of the said, the property of the said
, which had come into possession of said
 as such servant or agent by

Subscribed and sworn to before me, }
 this day of }

.....

No. 104.

Information for libel.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, says that he resides in the
 of; that on the day of instant,
 at, in said county, one did
 falsely, maliciously and scandalously frame, make, write and compose in a
 certain false, scandalous and libelous writing of, concerning and against the
 said, to the purport and effect following, to wit:

 and that with intention to scandalize and disgrace the said
 and to bring him into contempt, infamy and disgrace, the said
 did afterwards, on the day of at
 the aforesaid, openly deliver and publish to the
 said false, scandalous and libelous, in that he did

Subscribed and sworn to before me, }
 this day of }

.....

No. 105.

Information for assault with a sharp and dangerous weapon.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, deposes and says that he
 resides in the of; that on the
 day of, 188., at the, in said
 county, ... with force and arms, in and
 upon the said, then and there being, did make an assault,
 and the said with a certain, the

said, being then and there a sharp, dangerous weapon, which the said, then and there, in his hand had and held, then and there did beat, strike, cut, stab and wound, with intent upon him, the said, then and there feloniously to do bodily harm, without justifiable or excusable cause, by

Subscribed and sworn before me, }
the day of }

.....
.....

No. 106.

Information for seduction.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that she resides in the of; that on the day of 188.., at the in said county, ... with force and arms, under promise of marriage, did seduce and have illicit connection with one she the said then and there being an unmarried female of previous chaste character, by [state the manner and circumstances].

Subscribed and sworn to before me, }
this day of }

.....
.....

No. 107.

Information for forgery.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that one at in with intent to injure and defraud, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting, a certain, which said false, forged and counterfeited is as follows, that is to say by [state the method of execution].

Subscribed and sworn before me, }
this day of }

.....
.....

No. 108.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 1.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

.....of No.....street, in the city of
.....being duly sworn, says that she is the wife of.....
of said city; that she complains of her said husband of being a disorderly person, according to section 899 of the Code of Criminal Procedure, for that he has actually abandoned his wife and children without adequate support, and has left them in danger of becoming a burden upon the public, and he neglects to provide for them according to his means. Deponent further says that for several days last past he has actually abandoned his family without adequate support, and left them in danger of becoming a burden upon the public, and that such family is not possessed of property or of the means of obtaining a livelihood without the aid of such husband.

Subscribed and sworn before me, }
this....day of..... }

No. 109.

Information against disorderly person, under Code Criminal Procedure, § 899, subdivision 2.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

.....of No.....street, in the city
of Troy, being duly sworn, says that she complains of her husband,
..... of said city, of being a disorderly person,
according to section 899 of the Code of Criminal Procedure, for that he threatens to run away and leave his wife and children a burden upon the public, and that such family is not possessed of property or of the means of obtaining a livelihood without the aid of such husband.

Subscribed and sworn before me, }
this....day of.....188.. }

No. 110.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 3.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

.....being duly sworn, says that he resides in.
that one.....is a person in said city [or town], of.....who
pretends to tell fortunes, and where lost and stolen goods may be found, in
that he possesses supernatural gifts, and to the end that he extort money
[describe the manner of operation, etc.].

Subscribed and sworn before me, }
this....day of..... }

.....

.....

No. 111.

Information against disorderly person, under Code Criminal Procedure, § 899, subdivision 4.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

.....being duly sworn, says that he resides at.....
that one is a person who keeps a bawdy house in the city of
.....and a house for the resort of prostitutes, drunkards, tipplers
gamblers, habitual criminals, and other disorderly persons, in that he.....
.....

Subscribed and sworn before me, }
this....day of..... }

.....

.....

No. 112.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 5.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, deposes and says that he resides
in.....; that one.....is a person in the city of.....,
who has no visible profession or calling by which to maintain himself, but
who does so for the most part by gaming, in that he.....
.....

Subscribed and sworn before me, }
this.....day of..... }

.....

.....

No. 113.

Information against disorderly person, under Code of Criminal Procedure, § 809, subdivision 6.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, deposes and says that he resides in.....; that one.....in the city of..... is a juggler, common showman and mountebank, who exhibits and performs for profit, puppet shows, wire and rope dancers, and other idle shows, acts and feats, in that he [describe acts complained of].

Subscribed and sworn before me, }
this.....day of..... }

No. 114.

Information against disorderly person, under Code of Criminal Procedure, § 809, subdivision 7.

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY.

....., being duly sworn, says that he resides in.....; that one.....in the said city of....., is a person who keeps in a public highway or place in said city of.....an apparatus or device for the purpose of gaming, and who goes about exhibiting tricks and gaming therewith, in that he [describe acts complained of].

Subscribed and sworn before me, } ss.:
this.....day of..... }

No. 115.

Information against disorderly person, under Code of Criminal Procedure, § 809, subdivision 8.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, says that he resides in.....; that one..... is a person who plays in a public highway, or place, in said city [or town] with cards, dice and other apparatus or device for gaming; that [set out the specific acts complained of].

Subscribed and sworn before me, }
this... day of..... }

No. 116.

Information against disorderly person, under Code of Criminal Procedure, § 899, subdivision 2.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, says that he resides in.....; that who is an habitual criminal, and adjudged such at in..... in the State of New York, on the..... day of....., was found in in said city of..... as follows:..... under circumstances giving reasonable ground to believe that he was intending or waiting the opportunity to commit the crime of.....

Subscribed and sworn before me, }
this..... day of..... }

.....
.....

No. 117.

Information against habitual criminal, under Code Criminal Procedure, § 512, subdivision 1; also § 899, subdivision 2.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, says that he resides in.....; that who is an habitual criminal, and adjudged such at in..... in the State of New York, on the..... day of....., was found in in said city of....., in possession of a deadly and dangerous weapon, and in possession of a tool, instrument and material adapted to and used by criminals for the commission of crime; said possession was as follows:

Subscribed and sworn before me, }
this..... day of..... }

.....
.....

FORMS TO THE CODE

No. 118.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 1

STATE OF NEW YORK, } ss.:
COUNTY OF

....., of the city of , being
duly sworn, says that one, who is now in said
city [or town] of, is a person who, not having visible
means of support, lives without employment, in that he [state circumstances
and facts leading to that belief].

Sworn and subscribed before me, }
this day of }

.....
.....
.....

No. 119.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 2

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
the of; that
who resides in, is a person who, being an habitual drunkard,
abandons, neglects and refuses to aid in the support of his family, in that
he

Subscribed and sworn before me, }
this day of }

.....
.....
.....

No. 120.

Information against vagrant, under Code Criminal Procedure, § 887, subdivision 3

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
the of; that
who resides in, is a person who has contracted an infectious
and other diseases in the practice of drunkenness and debauchery requiring
charitable aid to restore him to health, in that he

Subscribed and sworn before me, }
this day of }

.....
.....
.....

No. 121.

Information against vagrant, under Code of Criminal Procedure, § 867, subdivision 4.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, says that.....
who resides at....., is a common prostitute, who has
no lawful employment whereby to maintain herself; that she [state facts and
circumstances on which affidavit is based].

Subscribed and sworn before me, }
this.....day of..... }

No. 122.

Information against vagrant, under Code of Criminal Procedure, § 877, subdivision 5.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, says that he resides in
.....; that....., in the said city
of....., is a person who wanders abroad and begs in said city
aforesaid, and who goes about from door to door in said city, and places him-
self in the streets, highways, passages and other public places in said c. ty, to
beg and receive alms, in that he [state facts and circumstances].

Subscribed and sworn before me, }
this.....day of..... }

No. 123.

Information against vagrant, under Code of Criminal Procedure, § 867, subdivision 6.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

....., being duly sworn, says that he resides in
the; that..... in said
city [or town] of is a person who wanders abroad and lodges
in taverns, groceries, ale-houses, watch and station-houses, out-houses market
places, sheds, stables, barns and uninhabited buildings, in said city, and in

the open air, and not giving a good account of himself, in that he [set up facts of the case].

Subscribed and sworn before me, }
 this.....day of..... }

No. 124.

Information against vagrant, under Code of Criminal Procedure, § 897, subdivision 7.

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, says that he resides in
; that.....in said city of.....
 is a person who, having his face painted, discolored, covered and concealed,
 and being otherwise disguised in a manner calculated to prevent his being
 identified, appears in a road and public highway in said city, and in a field,
 lot, wood and inclosure in said city, in that [give facts and circumstances in
 detail].

Subscribed and sworn before me, }
 this... ..day of..... }

No. 125.

Information against vagrant, under Code Criminal Procedure, § 897, subdivision 8.

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

.....being duly sworn, says that he resides at
in the city [or village] of....., and that
is a child between the ages of five and four-
 teen years, to wit, of the age of nine years, having sufficient bodily health and
 mental capacity to attend the public schools, and that on the....day of
1883, in the city of....., the said.....
 was found wandering abroad during the school hours in the streets of the city
 of....., a truant without lawful occupation, in that [describe acts
 and circumstances].

Subscribed and sworn before me, }
 this....day of..... }

No. 126.

Information against disorderly child.

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he
in.....that.....is a dis-
 orderly child, for that ..he.....deserted h.. home
 without good and sufficient cause, and kept company with dissolute or vicious
 persons, against the lawful commands of h.....
 and is a disorderly child within the intent and meaning of the statute; and is
 of the age of.....years; that the facts upon which this affidavit is
 based are as follows:.....

Subscribed and sworn before me, }
 this....day of..... }

.....

No. 127.

Information against persons selling chattels.

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he
 resides in; that he did, on the day of,
 188.., hire, loan and let to one a
 and said did, without the consent of,
 who is the owner thereof, sell and deliver the same, or did pawn or pledge
 the same, at, to one, and obtained
 thereon and therefor the sum of

Subscribed and sworn before me, }
 this day of..... }

.....

No. 128.

Information against person selling material, etc., furnished to be manufactured.

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he
 resides in the of; that on the
 day of, at the, of, one
 did willfully pawn, pledge, sell and convert to

h... own use, material, to wit:
 of the value of, furnished to h... by
 for the purpose of being manufactured into by

Subscribed and sworn before me, }
 this day of }

.....

No. 129.

Information against fighting animals, etc.

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

....., being duly sworn, complains, deposes and says,
 that he resides in the of; that he has just and rea-
 sonable cause to suspect and does suspect that certain of the provisions of law
 relating to and affecting animals, and especially the provisions of the follow-
 ing laws made and passed, : " to prevent prize fights and fights
 among game animals," for the more effectual
 prevention of cruelty to animals,

are being and are about to be vio-
 lated by
 at and within the particular building and place within the.....
 known as....., and now occupied, kept and used by.....

Wherefore this deponent prays that a warrant may be immediately issued
 and delivered, pursuant to the statute in such case made and provided, to any
 person authorized by law to make arrest for such offenses, authorizing him to
 enter and search such building and place, and to arrest the said.....
 by whatsoever names they may be known or called, or any or either of them
 there present from violating any of said laws, and to bring such person, when
 so arrested, before the nearest magistrate of competent jurisdiction, to be
 dealt with according to law.

Subscribed and sworn before me, }
 this day of }

.....

No. 130.

Information for reckless driving.

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

....., being duly sworn, deposes and says, that he
 resides in the..... of; that one.....,
 who was then and there driving a certain carriage, to wit, a.....,

upon a certain turnpike road or public highway within this State, to wit, upon a certain in the of, which then and there was such a turnpike road or public highway, with or without passengers, in said carriage, did then and there at the time and place aforesaid, willfully, unlawfully, wickedly and maliciously run, cause or permit to be run his horses then and there attached.

Subscribed and sworn before me, }
 this.....day of..... }

.....

.....

No. 181.

Information for keeping gambling place.

STATE OF NEW YORK, } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the of; that on the day of, and at the present time, did and does keep a room, building, arbor, booth, shed, tenement, boat or float, to wit: at, in the of to be used or occupied for gambling, to wit:, or did or does knowingly permit the same to be used or occupied for gambling, to wit: being the owner, superintendent or agent of a room, building, arbor, booth, shed, tenement, boat or float, to wit: at, in the of, did and does rent the same to be used or occupied for gambling, to wit:

Subscribed and sworn before me, }
 this day of }

.....

.....

No. 182.

Information for keeping place for fighting animals, etc.

COUNTY OF RENSSELAER, ss. :

....., being duly sworn, says that he resides at; that on the day of, in the city [or town] of, in the said county of, one willfully, unlawfully and wickedly, did keep, use, was connected with as, interested in the management of, did receive money for the admission of divers persons to a certain place, to wit: for the purpose of, and such place was

then and there kept or used for the purpose of fighting or baiting certain bulls, bears, dogs, cocks or other creatures, to wit:

Subscribed and sworn before me, }
this day of }

.....
.....

No. 133.

Information for confining cows in a crowded condition.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the..... of.....; that, on the..... day of....., at the..... of....., in the county of....., one..... wickedly, unlawfully and willfully, then and there, to wit, in....., in said city, did keep divers cows for the production of milk for market, sale or exchange, in a crowded and unhealthy condition, or did feed divers cows, then and there kept by him, the said....., on food that produces impure, diseased and unwholesome milk, to wit, distillery waste, usually called swill, or....., in violation of the statute in such case made and provided.

Subscribed and sworn before me, }
this..... day of..... }

.....
.....

No. 134.

Information for abandoning maimed creature in a public place.

STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the..... of.....; that, on the..... day of....., one..... did willfully, unlawfully and wickedly, then and there, abandon to die, in a certain public place in said city of Albany, to wit,..... a certain maimed, sick, infirm and disabled creature, to wit [describe the particular case complained of].

Subscribed and sworn before me, }
this..... day of..... }

.....
.....

No. 135.

*Information for wrongs affecting public moneys, etc.*STATE OF NEW YORK, } ss. :
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of ; that one with intent to defraud, did wrongfully obtain, receive, convert, pay out and dispose of, or who, with like intent, by willfully paying, allowing or auditing a false or unjust claim, or did aid or abet in wrongfully obtaining, receiving, converting, paying out or disposing of money, funds, credits and property held or owned by this State, or held or owned, officially or otherwise, for or on behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, agency or agent of a city, county, town, village and civil division, subdivision, department or portion of this State, to wit: by

Subscribed and sworn before me, }
this.....day of..... }

No. 136.

*Information against person having custody of child permitted to beg.*STATE OF NEW YORK, } ss. :
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the of ; that has the custody of....., a child under the age of fourteen years, and permits and neglects to restrain such child from begging, gathering picking and sorting of rags, and from collecting cigar stumps, bones and refuse from markets in said city of, in that he.....

Subscribed and sworn before me, }
this.....day of..... }

No. 137.

Information for selling mortgaged property.

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the of; that on the day of one gave, executed and delivered to a mortgage upon certain personal property, to wit:

..... of the value of dollars.

That afterwards and on the day 188... at in said county of, while the said mortgage was a lien on the said personal property, the said with intent to defraud said the mortgagee of said property, or a purchaser of said property from said did willfully, maliciously and unlawfully sell, assign, exchange and secrete the aforesaid personal property so mortgaged or sold as aforesaid by said to said by

Subscribed and sworn before me, }
 this day of }

.....

No. 138.

Information for setting on foot fights among game animals

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the of; that on the day of at the of in the county of one did wickedly, unlawfully and willfully set on foot, instigate, move to, carry on, promote, engage in as a witness, assistant, umpire or judge, or did towards the furtherance of a premeditated fight or contention between game birds, game cocks, dogs, bulls, bears, dogs and rats, dogs and badgers or other animals, to wit: which had been theretofore and was then and there, to wit: on the day aforesaid at the and in the county aforesaid, premeditated by certain persons who then and there, to wit: at the time aforesaid, and in the place aforesaid, did have the ownership or custody of such animals, to wit: of the afore-

said. in violation of the statute in such case made and provided.

Subscribed and sworn before me, }
 this.....day of..... }

.....

No. 139.

Information against permitting a place to be kept for fighting dogs, etc.

STATE OF NEW YORK } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the.....of.....; that on the.....day of..... one.....did permit and suffer a certain place, to wit,.....to be kept and used for the purpose of fighting or baiting bulls, bears, dogs, cocks or other creatures, to wit,.....he, the said.....being the.....thereof.

Subscribed and sworn before me, }
 this.....day of..... }

.....

No. 140.

Information against person arrested without warrant for committing felony in another county, under Code of Criminal Procedure, § 177, subdivision 3.

STATE OF NEW YORK } ss. :
 COUNTY OF..... }

....., being duly sworn, deposes and says that he is a policeman [or other officer] in the.....aforesaid; that having reasonable cause for believing that one.....committed the crime of.....in.....he arrested him without a warrant on the.....day of....., at said.....; that the grounds of deponent for believing that said.....committed said crime are as follows : [Describe grounds of belief.]

Subscribed and sworn before me, }
 this day of..... }

.....

No. 141.

Information for public intoxication.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, deposes and says that he is a policeman [or other officer] of the; that the above-named defendant was, on the day of, 188., about ... M., intoxicated in a public street or place, to wit: street in said, contrary to law

Subscribed and sworn before me, }
 this day of }

No. 142.

Information for assault with intent to ravish a woman of ten years and over

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, deposes and says that he resides in the of; that on the day of, 188., at the in said county, one ... with force and arms, in and upon, she then and there being a woman of the age of ten years and upwards, violently, forcibly and feloniously, did make an assault, and her, the said, then and there violently, forcibly and against her will, feloniously did ravish and carnally know [describe the manner of effecting the same].

Subscribed and sworn before me, }
 this day of }

No. 143.

Information against assault with intent to ravish a woman under the age of ten years.

STATE OF NEW YORK, } ss.:
 COUNTY OF

....., being duly sworn, says that he resides in; that on the day of, at, in said county, one, with force and arms in and upon, she then and there being a woman of the age

of nine years, violently, forcibly and feloniously did make an assault, and her the said then and there violently, forcibly and feloniously, and against her will, did ravish and carnally know by [describe the assault].

Subscribed and sworn before me, }
this day of }

.....
.....

No. 144.

Information for assault with intent to ravish woman — ten years and over.

COUNTY OF ss.:

....., being duly sworn, deposes and says that he resides in the of; that on the day of 188 .., at, in said county, ... with force and arms, in and upon, she then and there being a woman of the age of ten years and upwards, in the peace of God and of the said people then and there being, violently, forcibly and feloniously, did make an assault, and her, the said then and there violently, forcibly and against her will, feloniously did ravish and carnally know by

Taken, subscribed and sworn before }
me, this day of, 188 .. }

.....
Justice of the Peace (or Police Justice).

No. 145.

Information for seizure, etc., of gambling apparatus.

COUNTY OF ss.:

....., being duly sworn, deposes and says that he resides in the of; that one has committed an offense against

in that he did and has, as deponent has reason to believe and does believe, upon his person or at, in the of, certain articles of personal property, to wit: or gambling tables, devices or apparatus for the purpose of, or public or private lottery policies, to wit:, the discovery of which may lead to establish the truth of said charge for which complaint is hereby made against said

Wherefore, deponent prays that a warrant may issue as provided by law for the arrest of said, for diligent search to be made for such property, tables, devices or apparatus, and if found, to bring the same before

the magistrate or justice issuing the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the county of

Subscribed and sworn before me, }
this day of, 188.. }

.....
Police Justice (or Justice of the Peace).

No. 146.

Information for assault with intent to kill.

COUNTY OF....., ss.:

....., being duly sworn, deposes and says that he resides in the of; that on the of, 188...., at the in said county,..... with force and arms, in and upon the said..... then and there being, feloniously did make an assault, and the said with a certain, which the said then and there in hand had and held, the said being then and there a deadly weapon, and such means and force as was then and there likely to produce death, feloniously did beat, strike, cut and wound with intent him, the said, then and there, feloniously and willfully to kill by

Subscribed and sworn before me, }
this.... day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 147.

Information against child begging, etc., under section 898, Code of Criminal Procedure.

COUNTY OF....., ss.:

....., being duly sworn, deposes and says that he resides in.....; that on the day of, 188...., one....., a child of the age of years, was found begging for alms and soliciting charity from door to door in the said....., and was found begging for alms and soliciting charity in a street, highway and public place in said city, to wit, ... in that ..he.....

Subscribed and sworn before me, }
this.... day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 148.

Information for mayhem.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the.....of.....; that, on the.....day of....., 188., at the.....of....., one..... then and there feloniously, willfully and maliciously did, on purpose, and from premeditated design, or with intent to kill or commit a felony, to wit, cut out or disable the tongue of one.....put out the eye of one.....slit or destroy the lip of one, or slit or destroy the nose of one.....cut off or disable a limb or member, to wit:.....of.....on purpose.....by.....

Subscribed and sworn before me, }
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 149.

Information for search warrant, under Code of Criminal Procedure, § 798, subdivision 3.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, says that he resides in.....; that the following property.....is in the possession of.....at....., with the intent to use it as the means of committing a public offense, or is in the possession of....., to whom said.....delivered it for the purpose of concealing it, or preventing its being discovered; that the facts upon which this affidavit is based are as follows.....

Subscribed and sworn before me, }
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 150.

*Information for search warrant, under Code of Criminal Procedure, section 798
subdivision 2.*

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
.....; that the following property.....
has been used as the means of committing a felony by.....
at or is in the possession of
at or is concealed in in.....
that the facts upon which this affidavit is based are as follows:
.....

Subscribed and sworn before me, }
this.....day of 188.. }

.....
Police Justice (or Justice of the Peace).

No. 151.

*Information for search warrant, under Code of Criminal Procedure, section 798,
subdivision 1.*

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides in
.....; that the following property.....
has been stolen or embezzled from at
that is the owner thereof; that said property has been
stolen by and is now in his possession, or the pos-
session of at the
aforesaid, or is concealed in in said
that the facts upon which this affidavit is based are as follows:
.....

Subscribed and sworn before me, }
this..... day of 188.. }

.....
Police Justice (or Justice of the Peace).

No. 152.

Information for felony or misdemeanor.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in.....; that one..... at the..... in the county of..... aforesaid, on the..... day of 188.., did feloniously, wrongfully, unjustly, unlawfully, wickedly, willfully, corruptly, falsely, maliciously and knowingly violate chapter..... of the laws of the State of New York, passed..... in that he did....

Subscribed and sworn before me, }
 this..... day of..... 188.. }

.....
Police Justice (or Justice of the Peace).

No. 153.

Information for malicious trespass.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in..... street in the....., in the county aforesaid that on the..... day of....., in said city, one..... did maliciously, unlawfully, willfully and wantonly..... by.....

Subscribed and sworn before me, }
 this..... day of..... 188.. }

.....
Police Justice (or Justice of the Peace).

No. 154.

Information for overdriving, etc., any living creature.

STATE OF NEW YORK, } ss. :
 COUNTY OF.....

....., being duly sworn, deposes and says that he resides in the..... of.....; that on the..... day of 188.. at the..... of..... one..... did willfully, unlawfully, wickedly, or cause or procure, to overdrive, overload, torture, torment, deprive of necessary sustenance, unnecessarily beat, cruelly beat.

needlessly mutilate, needlessly kill, a certain living creature, to wit
 by then and there.

Subscribed and sworn before me, {
 this.....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 155.

Information for assault with intent to kill with fire arms.

STATE OF NEW YORK, { ss.:
 COUNTY OF..... }

....., being duly sworn, deposes and says that he
 resides in the.....of.....; that on the.....day of
 188..at the.....in said county, ...with force and
 arms, in and upon the body of.....in the peace of the said
 people, then and there being, feloniously did make an assault, and to, or toward
 and against.....the said.....a certain.....
 then and there loaded and charged with gunpowder and lead, which the said
 then and there had and held the same, being then
 and there likely to produce death, willfully and feloniously did then and
 there shoot off and discharge with intent him the said.....
 thereby then and there feloniously and willfully to kill
 by

Subscribed and sworn before me, {
 this.....of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 156.

Information for murder perpetrated from deliberate design.

STATE OF NEW YORK, { ss.:
 COUNTY OF..... }

....., being duly sworn, deposes and says that he
 resides in the of; that one,
 of, in the county of, on the day
 of, 188 .., with force and arms, did then and there feloniously,
 willfully and intentionally, and from a premeditated and deliberate design to
 effect the death of one, kill the said
 by

Subscribed and sworn before me, {
 this....day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 157.

*Information for manslaughter, first degree — killing unborn quick child.*STATE OF NEW YORK, }
COUNTY OF..... } ss.:

....., being duly sworn, deposes and says that ..he
resides in the of; that on the day of
....., 188...., at, in the county of.....,
one did feloniously and willfully kill an unborn quick
child by an injury to the mother of such child, in that ..he did.....

Subscribed and sworn before me, }
this....day of....., 188.. }

.....
Police Justice (or Justice of the Peace).

No. 158.

*Information for allowing disabled animals to lie in highways, etc.*STATE OF NEW YORK, }
COUNTY OF..... } ss.:

.....being duly sworn, deposes and says that
he resides in the.....of.....; that on the.....day of
....., 188.., at the....., one.....,
then and theretofore being the owner, driver or in possession of a certain old,
maimed and diseased horse or mule, which had theretofore been turned loose
or left disabled in a certain street, lane or public place in said.....
to wit,.....did unlawfully, willfully and wickedly,
for more than three hours after knowledge of such disability, allow such horse
or mule to lie in a certain street, lane or public place in said city therein,
to wit,.....

Subscribed and sworn before me, }
this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 159.

*Information for carrying creatures in a cruel manner.*STATE OF NEW YORK, }
COUNTY OF..... } ss.:

....., being duly sworn, deposes and says that
he resides in the.....of.....that on the.....day of
.....188..one.....did wilfully,

unlawfully and wickedly carry or caused to be carried in or upon a
a certain creature, to wit, ...
 in a cruel and inhuman manner, by then and there.....

Subscribed and sworn before me, {
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 160.

Information for murder perpetrated in commission of a felony.

STATE OF NEW YORK, { ss.:
 COUNTY OF..... }

....., being duly sworn, deposes and says that he resides
 in the.....of.....; that on the.....day of
 188., at the.....of.....in the county of.....
 one.....did feloniously and willfully and intentionally, whilst
 engaged in the commission of a felony, kill one.....in that
 he did.....

Subscribed and sworn before me, {
 this.....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 161.

Information for murder perpetrated by an act dangerous to others.

STATE OF NEW YORK, { ss.:
 COUNTY OF..... }

....., being duly sworn, deposes and says that he
 resides in the.....of.....; that, on the.....day of
, 188., at the.....of....., in the county
 of....., one.....did feloniously, willfully
 and intentionally, by an act immediately dangerous to others, and evincing a
 depraved mind, regardless of human life, did kill one.....,
 although without any premeditated design to effect the death of any par
 ticular individual, in that ..he did

Subscribed and sworn before me, {
 this....day of.....188.. }

.....
Police Justice (or Justice of the Peace).

No. 162.

*Information for injury to animal, by act or neglect.*STATE OF NEW YORK, } ss. :
COUNTY OF

....., being duly sworn, deposes and says that he resides in the of ; that on the day of 188., at the, in the county of one did, by his act or neglect, willfully, wickedly and maliciously kill, maim, wound, injure, torture and cruelly beat a certain horse, mule, ox, cattle, sheep or other animal, to wit: belonging to him the said or to one by then and there

Subscribed and sworn before me, }
this day of 188.. }

.....
Police Justice (or Justice of the Peace).

No. 163.

*Information for malicious mischief.*STATE OF NEW YORK, } ss. :
COUNTY OF

....., being duly sworn, deposes and says that he resides in ; that one on the day of 188., at the of did maliciously or wantonly injure or deface a monument or work of art, building, fence or other structure, or did destroy or injure an ornamental tree, shrub or plant, situated on a private ground or on a street, public place, public or private way or cemetery; or did paint or print upon or in any other manner place upon or affix to any stone or rock, not a part of a building, or upon or to any bridge or tree, words, letters, characters or devices, stating, referring to or advertising, or intended to state, refer to or advertise the sale or manufacture of any property or article, profession, business, exhibition, amusement or place of amusement, or other thing, or did directly or indirectly cause any such act to be done, or shall aid therein, by

Subscribed and sworn before me, }
this day of 188.. }

.....
Police Justice (or Justice of the Peace).

No. 164.

Affidavit to obtain search warrant, under Code of Criminal Procedure, § 798.

STATE OF NEW YORK, } ss. :
COUNTY OF.....

....., being duly sworn, says that he resides at
....., in the said county of.....; that, at.....
sforesaid, on the night of....., certain goods and
chattels, to wit [describing them] were stolen and carried away from his
residence without his knowledge or consent, and that there is probable cause
for suspecting that one....., residing at No.
.....street, in....., is the party
who stole and carried away said goods and chattels; and that said goods and
chattels are now secreted in the house of the said.....,
at No.....street, in.....

Subscribed and sworn before me, }
this...day of.....188.. }

No. 165.

Form of search warrant, under Code of Criminal Procedure, § 797.

STATE OF NEW YORK, } ss. :
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any peace officer in the county of.....

Proof by affidavit having been this day made before me, by.....
that the property hereinafter described was stolen or embezzled; that there is
probable cause for believing that the said property was stolen or embezzled,
you are therefore commanded in the day-time, or at any time of the day or
night, to make immediate search on the person of.....,
or in the....., situated.....,
for the following property:....., and if you find the
same, or any part thereof, to bring it forthwith before me, at.....,
in the.....

Dated at....., the day of.....

No. 166.

Search warrant, under Code of Criminal Procedure, § 792, subdivision 2.

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
 To

Proof by affidavit having been this day made before me, by....., that the property hereinafter described was used as the means of committing a felony, to wit:; that there is probable cause for believing that the property hereinafter described was used as the means of committing a felony, to wit:; you are therefore commanded in the day-time, or at any time of the day or night, to make immediate search on the person of....., or in the situated for the following property: and if you find the same, or any part thereof, to bring it forthwith before me, at in the

Dated at, the day of

No. 167.

Return to search warrant, under Code Criminal Procedure, § 805.

I, the undersigned, to whom this warrant was delivered for execution, do hereby certify that I did this.....day of.....take the property therein described from.....at..... under and by virtue of this warrant, and an inventory has been taken of this property which is hereto annexed.....

Dated at, the day of

A. B.,
 Constable (or other officer).

No. 168.

Search warrant, under Code Criminal Procedure, § 792, subdivision 2.

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
 To

Proof by affidavit having been this day made before me, by..... that the property hereinafter described is in the possession of..... with the intent to use it as the means of committing a public offense, to wit, ...or is in the possession of.....to whom said delivered it for the purpose of concealing it and preventing its being discovered; that there is probable cause for believing that the property hereinafter described is in the possession of..... with the intent to use it as the means of committing a public offense, to wit, ...or is in the possession of.....

to whom said delivered it for the purpose of concealing it and preventing it being discovered.

You are therefore commanded in the day-time, or at any time of the day or night, to make immediate search on the person of or in the situated for the following property: and if you find the same, or any part thereof, to bring it forthwith before me, at in the

Dated at, the day of

.....

No. 169.

Inventory and affidavit thereto of property taken under search warrant, under Code Criminal Procedure, §§ 805, 806.

STATE OF NEW YORK, } ss.:
COUNTY OF

Inventory of property taken by the undersigned, under and pursuant to the annexed warrant, made publicly and in the presence of, from whose possession it was taken, and of the applicant for the warrant

Dated

.....

Policeman (or other officer).

I, ..., the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn before me, }
this day of }

.....

.....

No. 170.

Receipt for property taken under search warrant, under Code Criminal Procedure, § 808.

I, ..., a constable [or other officer] of the of, have taken under a search warrant issued by a justice of the peace [or other officer] of the, from from whom it was taken, or in whose possession it was found, or from in the said, where the property hereinafter described was found, no person being there, the following described property, to wit:

A. B.,

Constable (or other officer).

No. 171.

Warrant for disorderly person, under Code Criminal Procedure, § 800.

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, } ss.:
 COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.
 To

Whereas, Information on oath has this day been duly made by
 of the city of in the county of, before me, ...
 one of the police justices [or justices of the peace] of the said city of
, that on the day of, 188., at the
 city of, in said county, and for several days last past, one
 was and is* a disorderly person, for that he has
 actually abandoned his wife and children without adequate support, and has
 left his wife and children in danger of becoming a burden upon the public;
 and has neglected to provide for his wife and children according to his means,
 against the peace of the people of the State of New York and the form of
 the statute in such case provided.

We, therefore, command you forthwith to apprehend and take the body of
 the said and bring him before the said,
 at the, in the said city of, for examina-
 tion, with this warrant and a return of your doings thereon indorsed, to
 answer the said complaint, and to be dealt with according to law Hereof
 fail not at your peril.

Witness, the said, at the city of,
 in the county aforesaid, the day of

.....
Police Justice (or Justice of the Peace).

NOTE. — To adapt the above form for each subdivision of § 800, insert after the star in the
 above the substance of each subdivision as the case requires.

No. 172.

Return to warrant against disorderly person.

By virtue of the within warrant I have arrested the within named
, and now have him before the magistrate by
 whom this warrant was issued.

Dated, etc.

A. R.,
Constable (or other officer).

No. 173.

Commitment of disorderly person, under Code of Criminal Procedure, § 193.

The within named having been brought before me under this warrant, is committed for examination to the sheriff of the county of.....

A. B.,
Justice of the Peace, etc.

No. 173½.

Order that arrest be made on Sunday, under Code of Criminal Procedure, § 170.

I do hereby order and direct that the arrest on the within warrant may be made on Sunday or at night.

A. B.
Justice of the Peace, etc.

No. 174.

Warrant to commit a child under the age of sixteen years—Plea of guilty.

STATE OF NEW YORK, }
COUNTY OF } ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To , and
to the superintendent of the House of Refuge for the Reformation of Juvenile Delinquents, in the city of New York, GREETING:

Whereas, On the.....day of....., 188., ... was brought before me,....., one of the justices of the peace in and for the county of....., charged on the oath of., which oath was believed by me, the said justice, with, on this present day, at the city of

And, whereas, The said justice, immediately and before any further proceedings were had, informed the said of the charges against h... and of h... right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said., and he, the said, was given a reasonable time to send for and advise with counsel.

And, whereas, He, the said....., did then and there plead guilty to the said charge.

And, whereas, It was ascertained by said justice that said was.....years old on the.....day of....., 188..

And whereupon the said justice did thereupon adjudge and determine that the said.....was guilty of the aforesaid charge and offense, and the said.....was thereupon convicted of the charge and offense aforesaid; and it was adjudged and determined by me that the said.....should be committed to, and

confined in, the House of Refuge for the Reformation of Juvenile Delinquents in the city of New York, until he should be thence discharged according to law.

Now, therefore, you, the said sheriff, constable marshal, or policeman, are commanded forthwith to convey and deliver the said..... into the custody of the said superintendent. And you, the said superintendent, are hereby commanded to receive the said..... into your custody, in the said House of Refuge, and h... there safely keep until... he shall be thence discharged according to law.

Given under my hand, at..... aforesaid, this....day of....., 188..

.....
Justice of the Peace (or Police Justice).

No. 175.

Warrant under laws to prevent prize fights, cruelty to animals, etc.

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

GREETING:

Whereas, ... has made complaint, under oath, to and before me,....., a police justice [or justice of the peace], in and for the.....; that he has just and reasonable cause to suspect, and does suspect, that certain of the provisions of law relating to and affecting animals, and

to prevent prize fights
and fights among game animals,

are being and are
about to be violated by at and within the particular building and place within the city and county aforesaid, known as..... and now occupied, kept and used by.....

Now, therefore, I,....., police justice [or justice of the peace] as aforesaid, do authorize you to enter and search the said building and place within the known as and to arrest the said..... by whatsoever names they may be known or called, or any or either of them there present found violating any of said laws, and to bring such person when so arrested before the nearest magistrate of competent jurisdiction, to be dealt with according to law. Hereof fail not at your peril.

Witness the said in the county aforesaid, the
...day of.....

A. B.

Police Justice (or Justice of the Peace).

No. 176.

Warrant for seizure of gaming apparatus, etc.

STATE OF NEW YORK, } ss. :
 COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To

Whereas, Complaint, on oath, has been duly made before me, ...
 police justice [or justice of the peace] of the
 that one

We, therefore, command you forthwith to arrest the said
 ; to make diligent search for such property, tables,
 devices or apparatus; and, after demanding entrance, to break open and enter
 said house or place, and any house or place wherein such gambling tables,
 establishment, devices or apparatus shall be kept, and to seize the aforesaid
 gambling tables, establishment, apparatus or devices, and deliver the same to
 of the and to return
 this warrant with your doings thereon, indorsed to me, the said
 at the in the said
 or, in case of my absence or inability to act, before the nearest or most acces-
 sible magistrate in the county of Hereof fail not at your peril.

Witness the said at the in
 the county aforesaid, the day of 188..

.....
Police Justice (or Justice of the Peace).

No. 177.

*Warrant for refusing or neglecting to obey subpoena, under Code of Criminal
 Procedure, §§ 619, 952; Code of Civil Procedure, §§ 8, 9, 10, 2870-2874.*

STATE OF NEW YORK, } ss. :
 COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

....., and to the keeper of the common jail of
 the county of

We command you and each of you that you attach
 and forthwith bring before our said court, in and
 for the at the, then and there to answer for a certain
 contempt in refusing or neglecting to attend the said court and give evidence
 before the said court, in obedience to a subpoena duly served on
 as a witness on behalf of the concerning a certain
 pending in said court against for and have
 you then and there this writ. And you are further commanded to detain
 in custody until discharged by our said court.

Witness, ..., Esquire, one of the police justice [or justice
 of the peace] of the this day of

.....
Police Justice (or Justice of the Peace).

No. 178.

Warrant for habitual criminal, under Code of Criminal Procedure, § 512, subdivision 1, and § 899, subdivision 9.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

Whereas, Complaint has this day been made by..... of the of..... on oath, before....., one of the justices of the peace of the..... [or police justice] of the said city, that on the..... day of..... 188.. at the..... in said county, one who is an habitual criminal, was found in possession of..... a deadly weapon, and in possession of..... a tool, instrument or material adapted to and used by criminals for the commission of crime, without being able to account therefor to the satisfaction of the said justice, against the peace of the people of the State of New York, and the form of the statute in such case provided; we therefore command you forthwith to take the body of the said, and bring h.. before the said, at the court-room, in the said, with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said, at the..... in the county aforesaid, the day of

.....
Justice of the Peace (or Police Justice).

No. 179.

Warrant for habitual criminal, under Code of Criminal Procedure, § 512, subdivision 2, and § 899, subdivision 9.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

Whereas, Complaint has this day been made by, of the city of, in the county of, on oath, before, one of the justices of the peace of the [or police justice], of the said, that on the day of, 188.., at the city of, in said county, one, who is an habitual criminal, was found, without being able to account therefor to the satisfaction of said justice, in, in said city, under circumstances giving reasonable ground to believe that he was intending and waiting the opportunity to commit some crime, to wit, the crime of, against the peace of the people of the State of New York, and the form of the statute in such case provided; we therefore command you forthwith to

take the body of the said....., and bring him before the said
 at the court-room, in the said
, with this warrant, and a return of your doings thereon
 indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said at the....., in the county aforesaid,
 the day of

.....
Justice of the Peace (or Police Justice).

No. 180.

*Warrant against vagrant, under Code of Criminal Procedure, § 887, and the
 various subdivisions thereof.*

STATE OF NEW YORK, }
 COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

Whereas, Information on oath has this day been made by
 of the in said county, before
 a justice of the peace [or police justice] of said county, that one
 at the, of, in said county,* is a person who
 has no visible means to maintain himself, and wanders about without employ-
 ment* [give facts and circumstances justifying issuing warrant], against the
 peace of the people of the State of New York and the form of the statute in
 such cases provided;

We, therefore, command you forthwith to take the body of the said
 and bring him before
 at the court-room in with this warrant and
 a return of your doings thereon indorsed, to be dealt with according to law.
 Hereof fail not at your peril.

Witness the said at the..... in the county
 aforesaid, the day of.....

A. B.,
Justice of the Peace (or Police Justice).

NOTE — In order to adapt the above form to any of the subdivisions of section 887, insert
 between the stars, in the above form, the substance of any particular subdivision as the case
 requires.

No. 181.

Warrant as to female under sixteen years of age living in house of prostitution,

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To

Whereas, Complaint has this day been made by.....
of the....., in the county of....., on oath, before
....., one of the justices of the peace of the.....
and police justice of the said city; that on the..... day of.....
188... at the..... in said county, one.....
a female child, of the age of..... years, is living, detained and kept in
a house and place No..... street,..... for the
purposes of prostitution;

And, Whereas, In the judgment of said justice, said.....
has just and reasonable cause to suspect that said child is so living, detained
and kept as aforesaid, against the peace of the people of the state of New
York and the form of the statute in such case provided;

We therefore command you forthwith to enter and search said house and
place, and bring said child, together with all persons occupying said house or
place or in charge thereof, before the said..... at the
..... court-room, in the..... with this warrant, and a
return of your doings thereon indorsed, to be dealt with according to law
Hereof fail not at your peril.

Witness, the said..... in the county aforesaid, the.....
day of.....

.....
Justice of the Peace (or Police Justice).

No. 182.

*Warrant to commit a vagrant child having parent, guardian or master—Plea of
guilty—under Code Criminal Procedure, § 868.*

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To

*and to the superintendent and principal keeper of the almshouse of the said
county, GREETING:*

Whereas, On the..... day of.....
was brought before me, ..., one of the justices of
the peace in and for the..... and county of....., charged on

the oath of, which oath was believed by me with being a vagrant within the intent and meaning of the statute and subdivision 8 of section 887 of the Code of Criminal Procedure, in that he is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, and was on the day of, 188., found wandering in the streets in said a truant without any lawful occupation;

And Whereas, The said, on being brought before said justice, was immediately informed by said justice of said charge against h... and of h... right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas, ... the parent, guardian or master of said child was duly summoned to attend the examination of said child on said charge;

And Whereas, The said charge was then and there distinctly read and stated to the said, and ..he, the said, having been given a reasonable time to send for and advise with counsel, did then and there plead guilty to the said charge in the presence of and before said justice, and of h... said parent, guardian or master;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..he, the said is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of, 188., found wandering in the streets in said a truant without any lawful occupation;

And Whereas, After the said complaint was satisfactorily established, the said justice did require the said parent, guardian or master to enter into an engagement in writing to the that he would restrain said child from so wandering about; would keep h... in his own premises or in some lawful occupation, and would cause h... to be sent to some school at least four months in each year, until ..he becomes fourteen years old. And the said parent, guardian or master having refused or neglected within a reasonable time so to do, it was adjudged and determined by me that the said should be committed to the alms-house of said county, there being no other place provided for h... reception.

Now, therefore, you the said sheriff, constable, marshal or policeman are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody in the said alms-house, and there safely keep until ..he shall be discharged according to law.

Given under my hand, at the city of Albany aforesaid, this day of, 188..

.....,

Justice of the Peace (or Police Justice).

No. 183

Warrant to commit vagrant child having parent, guardian or master — Plea not guilty — under Code of Criminal Procedure, § 888.

JUSTICES' COURT[†] (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

Is

and to the superintendent and principal keeper of the almshouse of the said county, GREETING:

Whereas, On the day of.....was brought before me.....one of the justices of the peace in and for the or police justice of said.....charged on the oath of.....which oath was believed by me, the said justice, with being a vagrant, within the intent and meaning of the statute and subdivision 8 of section 887 of the Code of Criminal Procedure, in that..he is a child of the age of.....years, having sufficient bodily health and mental capacity to attend the public schools, and was on the.....day of 188..found wandering in the streets in.....a truant, without any lawful occupation;

And Whereas, Said on being brought before said justice, was immediately informed by said justice of said charge against h... and of h...right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas, ...the parent, guardian or master of said was duly summoned to attend the examination of said.....on said charge;

And Whereas, The said charge was then and there distinctly read and stated to the said.....who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person,

And Whereas, The said testimony was given and evidence was had in the presence and hearing of the said.....and.....said parent, guardian or master, ..he the said.....having previously thereto been allowed a reasonable time to send for and advise with counsel;

And whereupon, the said justice did thereupon adjudge and determine that the said.....was guilty of the aforesaid charge, and the said.....was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..he, the said.....is a child of the age of.....years, having sufficient bodily health and mental capacity to attend the public schools, was on the.....day of 188..found wandering in the streets in said.....a truant, without any lawful occupation;

And Whereas, After the said complaint was satisfactorily established, the said justice did require the said parent, guardian or master to enter into an engagement in writing to the.....that ..he would restrain said

child from so wandering about; would keep h....in h....own premises or in some lawful occupation, and would cause h....to be sent to some school at least four months in each year, until ..he becomes fourteen years old; and the said parent, guardian or master having refused or neglected within a reasonable time so to do, it was adjudged and determined by me that the said should be committed to the ..alms-house of said county, there being no other place provided for h.. reception;

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said..... into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said.....into your custody, in the said alma-house, and there safely keep h....until ..he shall be discharged according to law.

Given under my hand, at the aforesaid, this.....day of.... ..

.....

Justice of the Peace (or Police Justice).

No. 184.

Warrant to commit vagrant child having no parent, guardian or master — Plea of guilty — under Code of Criminal Procedure, § 888.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

It , and to the
superintendent and principal keeper of the alma-houses of the said county,
GREETING:

Whereas, On the day of was brought before me, ..., one of the justices of the peace in and for the, or police justice of said charged on the oath of, which oath was believed by me, the said justice, with being a vagrant within the intent and meaning of the statute and subdivision 8 of section 887 of the Code of Criminal Procedure, in that ..he is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, and was, on the..... day of 188., found wandering in the streets in said a truant without any lawful occupation;

And Whereas, Said has no parent, guardian or master, or no parent, guardian or master can be found;

And Whereas, Said on being brought before said justice, was immediately informed by said justice of said charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas, The said charge was then and there distinctly read and stated

to the said , who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person;

And Whereas, The said testimony was given and evidence was had in the presence and hearing of the said....., he the said..... having previously thereto been allowed a reasonable time to send for and advise with counsel;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said..... was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that..he the said is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of found wandering in the streets in said , a truant without any lawful occupation, it was adjudged and determined by me that the said should be committed to the alms-house of said county, there being no other place provided for his reception;

Now, therefore, you the said sheriff, constable, marshall or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you the said superintendent and principal keeper are hereby commanded to receive the said into your custody, in the said alms-house, and there safely keep, or until ..he shall be discharged according to law.

Given under my hand, at the aforesaid, this day of

.....
Justices of the Peace (or Police Justices).

No. 185.

Warrant to commit vagrant child having no parent, guardian or master — Plea of guilty — under Code of Criminal Procedure, § 888.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To , and to

the superintendent and principal keeper of the alms-house of the said county,
GREETING:

Whereas, On the day of, ... was brought before me, ..., one of the justices of the peace in and for the [or police justice], of said city, charged on the oath of, which oath was believed by me, with being a vagrant within the intent and meaning of the statute, and subdivision 8 of section 887 of the Code of Criminal Procedure, in that ..he is a child of the age of years, having sufficient bodily health and mental capacity to

attend the public schools, and was, on the day of, 188.., found wandering in the streets in said, a truant without any lawful occupation;

And Whereas, Said has no parent, guardian or master, or no parent, guardian or master can be found;

And Whereas, Said, on being brought before said justice, was immediately informed by the said justice of said charge against h... and of h.. right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had;

And Whereas, The said charge was then and there distinctly read and stated to the said, and ..he, the said, having been given a reasonable time to send for and advise with counsel, did then and there plead guilty to the said charge;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..he, the said, is a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of, 188.., found wandering in the streets in said, a truant, without any lawful occupation, it was adjudged and determined by said justice that the said should be committed to the alms-house of said county, there being no other place provided for h.. reception;

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house, and ..he there safely kept until ..he shall be discharged according to law.

Given under my hand, at the aforesaid, this day of

.....
Justice of the Peace (or Police Justice).

No. 186.

Warrant to commit a child found begging — Plea of guilty — under Code Criminal Procedure, § 893.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To and to
the superintendent and principal keeper of the alms-house of the said county,
GREETING:

Whereas, On the day of,
was brought before me, ..., one of the justices of the

peace in and for the....., or police justice of said city, charged on the oath of which oath was believed by me, the said justice, with being a child of the age of years, who was on the day of found begging for alms, and soliciting charity from door to door in said, and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit

And, Whereas, The said justice immediately and before any further proceedings were had informed the said of the charge against, and of h... right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, and he, the said was given a reasonable time to send for and advise with counsel.

And, Whereas, He, the said, did then and there plead guilty to the said charge, and in the presence of the said court.

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a child of the age of years, who was, on the day of, 188., found begging for alms and soliciting charity from door to door, in said, and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit, ...

And it was adjudged and determined by me that the said should be committed to the alm-house of said, to be kept employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper are hereby commanded to receive the said into your custody, in the said alms-house, and keep h... employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Given under my hand, at the aforesaid, this day of

.....

Justice of the Peace (or Police Justice).

No. 187.

Warrant to commit a child found begging—Plea of not guilty,—under Code of Criminal Procedure, § 893.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To , and
to the superintendent and principal keeper of the alms-houses of the said county,
GREETING:

Whereas, On the day of ,
was brought before me....., one of the justices of
the peace in and for the , or police justice of said
city, charged on the oath of....., which oath was
believed by me, the said justice, with being a child of the age of.....
years, who was, on the day of....., 188., found
begging for alms and soliciting charity from door to door in said.....
and who was on the same day found begging for alms and soliciting charity
in a street, highway and public place in said city, to wit:

And, Whereas, The said justice, immediately and before any further pro-
ceedings were had, informed the said..... of the
charge against him, and of his right to the aid of counsel in every stage of
the proceedings; and the said charge was then and there distinctly read and
stated to the said....., who then and there pleaded
not guilty thereto, who was then and there tried upon the said charge by the
said justice, who did thereupon hear testimony on oath in support of said
charge, and in defense thereof, and on behalf of said person.

And, Whereas, The said testimony was given, and evidence was had in the
presence and hearing of the said he, the said
....., having previously thereto been allowed a
reasonable time to send for and advise with counsel.

And whereupon the said justice did thereupon adjudge and determine that
the said..... was guilty of the aforesaid charge,
and the said..... was thereupon convicted of the
charge aforesaid, to wit: of being a child of the age of..... years, who
was, on the day of....., 188., found begging for alms
and soliciting charity from door to door in said....., and who was
on the same day found begging for alms and soliciting charity in a street,
highway and public place in said city, to wit:

.....
and it was adjudged and determined by me that the said.....
should be committed to the alms-house of the said....., to be kept
employed and instructed in useful labor until discharged by the county
superintendent of the poor, or bound out as an apprentice by him as pre-
scribed by special statutes.

Now, therefore, you, the said sheriff, constable, marshal or policeman, are
commanded forthwith to convey and deliver the said.....
into the custody of the said superintendent and principal keeper of the said

almshouse. And you, the said superintendent and principal keeper, are hereby commanded to receive the said.....into your custody, in the said almshouse, and keep h... employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Given under my hand, at.....aforesaid, this....day of....., 188..

.....

Justice of the Peace (or Police Justice).

No. 188.

Warrant to commit a vagrant on plea of guilty, under Code Criminal Procedure, § 892.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To and to
the superintendent and principal keeper of the almshouse or penitentiary of the said county, GREETING:

Whereas, ... has this day been duly examined, tried and convicted before me, ... one of the justices of the peace in and for the and county of and police justice of said city, upon the complaint on oath of of being, at the aforesaid, on this present day, a vagrant, for that the said, at the aforesaid, on this present day, is a person who, not having visible means to maintain h....., lives without employment;

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said of the charge against h..., and of h... right to the aid of counsel in every stage of the proceedings, and the said charge was distinctly read and stated to the said, and ..he, the said was given a reasonable time to send for and advise with counsel;

And Whereas, ..he, the said did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that ..he, the said, was and is a vagrant within the intent and meaning of the statute; and it was adjudged and determined by me that the said, who is not a notorious offender, and is a proper object for such relief, should be committed to the almshouse, or being a notorious offender, and an improper person to be sent to the almshouse, should be committed to and confined in the almshouse or penitentiary of said county for the term of .. at hard labor.

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said into the custody of the said superintendent and principal keeper of the said

alms-house or penitentiary. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house or penitentiary, for the term of at hard labor, and h... there safely keep until the expiration of the said

Given under my hand, at the aforesaid, this day of

.....
Justice of the Peace (or Police Justice).

No. 189.

Warrant to commit a vagrant after trial — Plea of not guilty — under Code of Criminal Procedure, § 892.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To and to
the superintendent and principal keeper of the alms-house and penitentiary of the said county, GREETING:

Whereas, On the day of, ... was brought before me, ..., one of the justices of the peace in and for the and county of or police justice of said, charged on the oath of, which oath was believed by me, the said justice, with, on this present day, at the..... and being a vagrant within the intent and meaning of the statute;

And Whereas, The said justice, immediately and before any further proceedings were had, informed the said of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person;

And Whereas, The said testimony was given and evidence was had in the presence and hearing of the said, he, the said, having previously thereto been allowed a reasonable time to send for and advise with counsel;

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that, the said, on this present day, at the city of, aforesaid, ... was and is a vagrant within the intent and meaning of the statute; and it was adjudged and determined by me that the said

who is not a notorious offender, should be committed to the alms-house of the said county of, or being a notorious offender and improper person to be sent to the alms-house, should be committed to and confined in the alms-house or penitentiary of said county for the term of at hard labor;

Now, therefore, you, the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said .. into the custody of the said superintendent and principal keeper of the said alms-house or penitentiary. And you, the said superintendent and principal keeper, are hereby commanded to receive the said into your custody, in the said alms-house or penitentiary, for the term of, at hard labor, and there safely keep until the expiration of the said

Given under my hand, at the aforesaid, this day of

Justice of the Peace (or Police Justice).

No. 190.

Warrant to commit disorderly person for not giving security to support his wife and children, etc.—Plea of guilty—under Code of Criminal Procedure, § 908.

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To

Whereas, On the day of, ... was brought before me, ..., one of the justices of the peace in and for the ... and county of or police justice of said city, charged upon the complaint on the oath of with having, on the day of, 188.; at the aforesaid, been a disorderly person, for that the said

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, and he the said was given a reasonable time to send for and advise with counsel;

And Whereas, He, the said did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that he, the said at the aforesaid, on the day of 188., did

And Whereas, The said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the

said was thereupon convicted of the offense afore
said, of being a disorderly person, in that he, the said
at the aforesaid, on the day of
188..., did

And Whereas, Prior to such conviction, the said was
required to give security by a written undertaking, with.....
suret.....in the sum of hundred dollars, that he would support
his wife and children, and would indemnify the against their
becoming, within one year, chargeable upon the public; and inasmuch as the
said has not given the said undertaking required as
aforesaid, the said was, by the said justice, convicted
of being a disorderly person as aforesaid, and the said justice having duly
made up and signed by him with his name of office, and immediately filed in
the office of the clerk of the county of a record of such conviction
of the said.....

These are, therefore, to command you, the said constable, marshal or
policeman, forthwith to carry and deliver the said ... into
the custody of the said sheriff. And you, the said sheriff, are hereby com-
manded to receive the said into your custody in the
county jail of said county, and there safely keep him in said county jail for
the term of at hard labor, or until he give the said security
required as aforesaid.

Given under my hand, at the aforesaid, this
day of

.....
Justice of the Peace (or Police Justice).

No. 191.

*Warrant to commit a disorderly person for not giving security to support his wife
and children, etc.—Plea of not guilty—under Code Criminal Procedure, § 908.*

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.
It

Whereas, On the day of.....
was brought before me, ... one of the justices of the
peace, in and for the and county of....., and police
justice of said city, charged upon the complaint, on oath, of.....
with having on day of....., at the.....
aforesaid, been a disorderly person, for that the said.....

And, Whereas, The said justice immediately, and before any further pro-
ceedings were had, informed the said of the charges
against him and of his right to the aid of counsel in every stage of the pro-
ceedings, and the said charge was then and there distinctly read and stated to
the said, who then and there pleaded not guilty

thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of the said.....

And, Whereas, The said testimony was given and evidence had in the presence and hearing of the said he, the said having previously thereto been allowed a reasonable time to send for and advise with counsel;

And, Whereas, The said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said..... was thereupon duly convicted of the offense aforesaid, to wit, of being a disorderly person, in that the said..... at the aforesaid on the said..... day of..... did

And, Whereas, Prior to such conviction, the said was required to give security by a written undertaking with ... suret..., in the sum of hundred dollars; that he would support his wife and children, and would indemnify the against their becoming within one year chargeable upon the public; and inasmuch as the said did not give the said undertaking required as aforesaid, the said was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed by him with his name of office, and immediately filed in the office of the clerk of the county of a record of such conviction of the said.....

These are, therefore, to command you, the said constable, marshal or policeman, forthwith to carry and deliver the said..... into the custody of the said sheriff; and you, the said sheriff, are hereby commanded to receive the said..... into your custody in the county of said county, and there safely keep him in said county jail for the term of..... hard labor, or until he give the said security required as aforesaid.

Given, under my hand, at the.....aforesaid, this....day of.....

.....
Justice of the Peace (or Police Justice).

No. 192.

Warrant to commit a disorderly person for not giving security for good behavior after a plea of guilty, under Code of Criminal Procedure, §§ 901, 908.

JUSTICES' COURT (OR POLICE COURT).

STATE OF NEW YORK, }
COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To

....., GREETING:

Whereas, On the day of, ... was brought before me, ..., one of the justices of the

peace in and for the, and county of or police justice of the said city, charged upon the complaint on the oath of, with having, on the ... day of, at the aforesaid, been a disorderly person, for that the said

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said of the charge against h, and of h right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, and .. he, the said, was given a reasonable time to send for and advise with counsel;

And Whereas, He, the said, did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that .. he, the said, at the aforesaid, on the day of did

And Whereas, The said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge, and the said was thereupon convicted of the offense aforesaid, of being a disorderly person, in that .. he, the said, at the city of aforesaid, on the day of, 188..., did

And Whereas, Prior to such conviction the said was required to give security by a written undertaking with suret ... in the sum of hundred dollars, for h .. good behavior for the space of one year, and inasmuch as the said did not give the said undertaking required as aforesaid, the said was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed and immediately filed in the office of the clerk of the county of a record of such conviction of the said

These are, therefore, to command you, the said constable, marshal or policeman, forthwith to carry and deliver the said into the custody of the said sheriff. And you, the said sheriff, are hereby commanded to receive the said into your custody in the county jail of said county, and there h .. safely keep in said county jail, for the term of, at hard labor, or until .. he give the said security required as aforesaid.

Given under my hand, at the .. aforesaid, this day of, 188 ..

.....

Police Justice (or Justice of the Peace).

No. 193.

Warrant to commit a disorderly person for not giving security for good behavior after a plea of not guilty, under Code of Criminal Procedure, §§ 901, 903.

JUSTICES' COURT (OR POLICE COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
1:

GREETING:

Whereas, On the.....day of, ...
was brought before me, ...one of the justices of the
peace in and for the and county of police
justice of said city, charged upon the complaint on oath of
with having, on the.....day of..... at the city of
aforesaid, been a.....

And Whereas, The said justice immediately, and before any further proceedings were had, informed the said.....of the charge against h...and of h....right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said....., who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of the said.....

And Whereas, The said testimony was given and evidence had in the presence and hearing of the said.....he, the said having previously thereto been allowed a reasonable time to send for and advise with counsel;

And Whereas, The said justice did thereupon adjudge and determine that the said.....was guilty of the aforesaid charge, and the said.....was thereupon duly convicted of the offense aforesaid, to wit, of being a disorderly person, in that the said at the.....aforesaid, on the said.....day of.....did.....

And Whereas, Prior to such conviction the said was required to give security by a written undertaking with suret.....in the sum of.....hundred dollars, for h....good behavior for the space of one year, and inasmuch as the said did not give the said undertaking required as aforesaid, the said.....was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed and immediately filed in the office of the clerk of the county of.....a record of such conviction of the said

These are, therefore, to command you, the said constable, marshal or policeman forthwith to carry and deliver the said into the custody of the said sheriff. And you, the said sheriff, are hereby commanded to receive the said into your custody in the county jail of said county, and there h....safely keep in said

county jail, for the term of at hard labor, or until
..he give the said security required as aforesaid.

Given under my hand, at the.... aforesaid, this....
day of.....

.....

Police Justice (or Justice of the Peace).

No. 194.

Warrant for felony, under Code of Criminal Procedure, §§ 151-154.

JUSTICES' COURT (OR POLICE COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To
.....

Information, upon oath, having been this day laid before me, that the crime
of..... has been committed, and accusing.....
.....thereof.

You are therefore commanded forthwith to arrest the above-named
.....
and bring h... before me at the.....court in the said county of
....., or, in case of my absence or inability to act, before the
nearest or most accessible magistrate in this county.

Dated at....., this.....day of..... 188..

.....

Justice of the Peace (or Police Justice).

No. 195.

*Affidavit proving handwriting of justice who issued warrant to be executed in
another county, under Code of Criminal Procedure, § 157.*

STATE OF..... } ss.:
COUNTY OF.....

....., being duly sworn, says that he resides in the
city of Albany; that the name of....., purporting
to be signed to the above warrant, is the handwriting of.....,
who is one of the police justices and justices of the peace of the
in the county of....., by whom the above warrant was issued.

Sworn before me, this....day }
of.....188.. }

.....

.....

No. 196.

Return to warrant for felony.

By virtue of the within warrant I have arrested the within named, and now have him before the magistrate by whom this warrant was issued, or before being the nearest or most accessible magistrate in the county of....., the magistrate by whom this warrant was issued being absent or unable to act.

Dated at....., this..... day of....., 188..

A. B.,
Constable (or other officer).

No. 197.

Commitment on warrant for felony, under Code of Criminal Procedure, § 198.

The within named..... having been brought before me under this warrant, is hereby committed for examination to the sheriff of the county of.....

.....
Justice of the Peace (or Police Justice).

No. 198.

Permission to execute warrant in another county, under Code of Criminal Procedure, § 156.

The within warrant may be executed in the county of.....

Dated at..... this..... day of..... 188.

A. B.,
Justice of the Peace (or Police Justice).

No. 199.

Warrant of arrest for misdemeanor, under Code of Criminal Procedure, § 164.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF..... } ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To

Information upon oath having been this day laid before me that the crime of..... has been committed, and accusing thereof,

You are therefore commanded forthwith to arrest the above named and bring h.. before me at the..... court, in the..... in the said county of..... or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at..... this..... day of..... 188.

.....
Justice of the Peace (or Police Justice).

No. 200.

Permission to execute warrant for misdemeanor on Sunday or in night-time, under Code of Criminal Procedure, § 170.

I do hereby order and direct that the arrest on the within warrant may be made on Sunday or at night.

A. B.,
Justice of the Peace (or Police Justice).

No. 201.

Warrant to commit child under sixteen years — Plea of not guilty.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To
and to the superintendent of the House of Refuge for the Reformation of Juvenile Delinquents in the city of New York, GREETING:

Whereas, On the day of 188., ... was brought before me, ..., one of the justices of the peace in and for the city and county of, or police justice of said city, charged on the oath of, which oath was believed by me, the said justice, with, on this present day, at the.....

And Whereas, The said justice, immediately and before any further proceedings were had, informed the said of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said, who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person;

And Whereas, The said testimony was given and evidence was had in the presence and hearing of the said, he, the said having previously thereto been allowed a reasonable time to send for and advise with counsel;

And Whereas, It was ascertained by said justice that said was years old on the day of

And whereupon the said justice did thereupon adjudge and determine that the said was guilty of the aforesaid charge and offense, and the said was thereupon convicted of the charge and offense aforesaid, and it was adjudged and determined by me that the said should be committed to and confined in the House of Refuge for the Reformation of Juvenile Delinquents in the city of New York, until he should be thence discharged according to law.

Now, therefore, you the said sheriff, constable, marshal or policeman, are

commanded forthwith to convey and deliver the said into the custody of the said superintendent. And you, the said superintendent, are hereby commanded to receive the said into your custody, in the said House of Refuge, and there safely keep until he shall be thence discharged according to law.

Given under my hand, at the aforesaid, this day of

.....

Justice of the Peace (or Police Justice).

No. 902.

Warrant against child begging, under Code of Criminal Procedure, § 802.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

Whereas, Complaint has this day been made by of the in the county of, on oath, before one of the justices of the peace of the or police justice of the said city; that on the day of, at the in said county, one, a child of the age of years, was found begging for alms and soliciting charity from door to door, and was found begging for alms and soliciting charity in a street, highway and public place in said city, to wit: against the peace of the people of the State of New York and the form of the statute in such case provided.

We, therefore, command you forthwith to take the body of the said and bring h .. before the said, at the court room, in the said, with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said, at the, in the county aforesaid, the day of

.....

Justice of the Peace (or Police Justice).

No. 203.

Warrant of commitment for being intoxicated in a public place

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, {
COUNTY OF } ss.:IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.
To

GREETING:

Whereas, ... has this day been duly examined, tried and convicted before me, ..., one of the justices of the peace in and for the ... county of ..., police justice of said ..., upon the information on oath of ..., and on competent testimony, of having been intoxicated in a public street or place in said ..., contrary to law

And Whereas, Upon such conviction, I did adjudge and determine that the said ... should pay a fine of ... dollars, and two dollars costs, and in default thereof that ... be committed to the penitentiary of said county for the term of ... days, unless the fine be sooner paid;

These are, therefore, to command you, the said sheriff, constable, marshal or policeman, forthwith to convey and deliver the said ... to the said superintendent of the said penitentiary. And you, the said superintendent, are hereby commanded to receive the said ... into your custody, in the said penitentiary, and h... there safely keep until the expiration of the said ... days, unless the fine be sooner paid, or ... be thence discharged in due course of law.

Given under my hand, at ... the ... day of ...
.....

Police Justice (or Justice of the Peace).

No. 204.

Statement and questions put to defendant by justice, under Code of Criminal Procedure, §§ 188, 189.

JUSTICES' COURT (OR OTHER COURT).

Before....., *Justice*, ... 1898.

THE PEOPLE
against
JOHN DOE.

The defendant, immediately on being brought before said justice, was informed by said justice as follows:

You are charged with the crime of.....

You have the right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

Question. Do you require counsel? If you do, you will be allowed a reasonable time to send for him, and the examination will be adjourned for that purpose.

Answer

[.....appeared as counsel for the defendant, or no counsel appearing, and after waiting a reasonable time therefor, the said justice put the following questions to the defendant]:

Question. Do you desire an examination of this case, or do you waive examination and elect to give bail?

Answer

.....

Police Justice (or Justice of the Peace).

No. 205.

Commitment on charge of intoxication.

POLICE COURT (OR OTHER COURT).

Before....., *Justice.*

STATE OF NEW YORK, } ss.:
COUNTY OF.....

To the Sheriff of the county of Albany:

....., having been brought before me, charged with the offense of public intoxication, of.....

..... you will receive and safely keep within the common jail of said county for further examination.

Dated at....., this.....day of....., 188..

.....

Justice.

No. 206.

Resignance of disorderly person, under Code of Civil Procedure, § 809, subdivisions 1 and 2.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF.....

Be it remembered, that on this day of, in the year of our Lord one thousand eight hundred and eighty-...., of the, in said county, and, both of the same place, personally came before me, ..., one of the justices of the peace in and for the, or police justice of the said, and severally and respectively acknowledged themselves to be indebted to the people of the State of New York, in the sum of hundred dollars each, to be levied of their respective goods and chattels,

lands and tenements, to the use of the said people, if default shall be made in the conditions following, viz:

Whereas, On the day of, 188., ... did make complaint on oath before the said, one of the justices of said, or police justice of the, against, in which complaint the said alleges that the said, and the said justice having caused the said to be brought before him and examined touching the offense in said complaint alleged, and it appearing to the said justice, upon such examination, by the confession of said, and by competent testimony, that was guilty of the offense in said complaint alleged, and was and is a disorderly person, and, for the reasons set forth in said complaint, the said justice did thereupon require the said to enter into a recognizance with surety, approved by the said justice, in the sum of hundred dollars, that he will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public.

Now, therefore, we hereby undertake that the said will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public, or we will pay to the people of the State of New York the sum of hundred dollars.

Subscribed and acknowledged before }
me, this day of 188.. }

.....
.....

No. 207.

Recognizance for support of wife and children of disorderly person, taken after commitment, under Code of Criminal Procedure, § 809, subdivisions 1 and 2.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:
COUNTY OF

Be it remembered, that on this day of 188., ... of the in said county, and of the same place, personally came before us, ... and two of the justices of the peace [or police justices] of the said county, and jointly and severally acknowledged themselves to be indebted to the people of the State of New York, in the sum of hundred dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the conditions following:

Whereas, ... was on the day of 188.. duly convicted before justice of the peace [or police justice] of said upon the

complaint made before him, and of the offense of being a disorderly person, for that the said

And prior to such conviction the said justice did require of the said that he give security by a written undertaking with suret in the sum of hundred dollars; that he will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public; and for not giving the said undertaking the said was, by the said justice, convicted of being a disorderly person as aforesaid, and a record of said conviction was duly made by the said justice, and signed by him with his name of office, and filed in the office of the clerk of the county of and said was, by a warrant signed by the said justice, with his name of office, committed to the county jail of the county of for the term of at hard labor, or until he gives the said undertaking required as aforesaid, and still remains in the county jail of said county; and application having been made to us, the said two justices, to take such undertakings so as aforesaid required of and in behalf of the said

Now, therefore, we hereby undertake that if the said will support his wife and children, and will indemnify the against their becoming within one year chargeable upon the public, or we will pay to the people of the State of New York the said sum of hundred dollars.

Subscribed and acknowledged before us the }
day and year first above written. }

Justice of the Peace (or Police Justices).

No. 208.

Recognizances for good behavior of disorderly person, under Code of Criminal Procedure, § 809, subdivisions 3, 9.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
COUNTY OF } ss.:

Be it remembered, that on this day of in the year of our Lord one thousand eight hundred and eighty of the in said county, and both of the same place, personally came before me one of the justices of the peace in and for the or police justices of the said and severally and respectively acknowledged themselves to be indebted to the people of the State of New York, in the sum of hundred dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people if default shall be made in the conditions following, viz. .

Whereas, On the day of, 188 did make complaint on oath before the said one of the justices of said or police justice of the, against

.....in which complaint the said.....alleges
 that the said.....
 and the said justice having caused the said.....to be brought
 before him and examined touching the offense in said complaint alleged, and
 it appearing to the said justice upon such examination, and by competent
 testimony, that.....was guilty of the offense in said complaint
 alleged, and was and is a disorderly person, and, for the reasons set forth in
 said complaint, the said justice did thereupon require the said.....
 to enter into a recognizance with.....suret....in the sum of.....
 hundred dollars, for the good behavior of the said.....
 for the space of one year.

Now, therefore, we hereby undertake that the said.....will
 be of good behavior for the space of one year next ensuing the date hereof,
 and not be guilty of the acts set forth in said complaint, or we will pay to the
 people of the State of New York, the sum of.....hundred dollars.

Subscribed and acknowledged before me, }
 this.....day of.....188.. }

.....

No. 209.

Recognizance for good behavior of disorderly person — taken after commitment.

POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, }
 COUNTY OF..... } ss. :

Be it remembered, that on this..... day of 188..
 of the..... in said county, and of the same place, per-
 sonally came before us..... of the same.....
 and two of the justices of the peace [or police justices]
 of the said..... and county, and jointly and severally acknowledged
 themselves to be indebted to the people of the State of New York, in manner
 following, in the sum of hundred dollars, to be levied of their
 respective goods and chattels, lands and tenements, to the use of the said
 people, if default shall be made in the condition following :

Whereas..... was on the day of..... 188.. duly
 convicted before..... justice of the peace [or police justice] of
 said.... upon the complaint made before him, of the offense of being
 a disorderly person ; for that the said.....

And prior to such conviction the said justice did require of the said
 that ..he give security by a written undertaking with.....suret... approved
 by him, in the sum of..... hundred dollars for his good behavior for the
 space of one year ; and not giving the said undertaking the said.....
 was by the said justice convicted of being a disorderly person as aforesaid,
 and a record of said conviction was duly made by the said justice, and signed
 by him with his name of office, and filed in the office of the clerk of the

county of..... and said..... was, by a warrant signed by the said justice, with his name of office, committed to the county jail of the said county of..... for the term of..... at hard labor, or until he give the said security required as aforesaid, and still remains in the county jail of said county; and application having been made to us, the said two justices, to take such undertaking so as aforesaid required of and on behalf of the said.....

Now, therefore, we hereby undertake that the said will be of good behavior for the space of one year from the time of the said conviction, and shall not, during such time, be guilty of any of the acts .. he was so as aforesaid convicted of being a disorderly person, or we will pay to the people of the State of New York, the said sum of..... hundred dollars.

Subscribed and acknowledged before, us the }
day and year first above written. }

.....
Justices of the Peace (or Police Justices).

No. 210.

Bill of exceptions, under Code Criminal Procedure, § 455.

COURT OF OYER AND TERMINER — County.

THE PEOPLE
against

At a court of oyer and terminer, held in and for the county of at the court-house in the, before Hon., a justice of the supreme court, on the day of, an indictment against, of which the annexed marked "A" is a copy, came on to be tried, and a jury having been impaneled and sworn, the following testimony was then had, and the following proceedings were then and there had, to wit:

John Doe, a witness on behalf of the people, being duly sworn, testified as follows:

[Insert all testimony and exceptions.]

The evidence here closed, and the above was all the evidence taken on said trial.

The court charged the jury, among other things, that [insert that part of the charge objected to], to which portion of the charge the counsel for the prisoner duly excepted.

And the counsel for the prisoner thereupon requested the court to charge the jury as follows: [Insert request to charge.] The court refused so to charge, and the counsel for the prisoner then and there excepted.

The said cause was on the said day of submitted to the jury, who, on the same day, returned into court and rendered their verdict, by which they found the said defendant guilty of the crime charged in the indictment.

And because none of the said exceptions so offered and made do appear upon the record of said trial, therefore, in the presence of the defendant, the said court has signed the said exceptions according to the statute in such case made and provided.

Dated this day of

A. B.,

Justice Supreme Court.

B. C., *Attorney for Defendant.*

"A."

At a court of oyer and terminer, held at the court-house, in the... ..
on the.... ..day of.....

This schedule consists of a copy of the indictment which should be attached to the bill of exceptions, and reference thereto made in the bill itself.

No. 211.

Notice to settle bill of exceptions, under Code Criminal Procedure, § 458.

COURT OF OYER AND TERMINER—..... COUNTY.

THE PEOPLE
against

}

SIR. — Please to take notice that on the bill of exceptions served on you herein, and upon the amendments thereto served by you, the defendant herein, ..., will make a motion before Hon. at his chambers, in the city of, on the.... day of..... at 10 o'clock A. M. of that day, to have the said bill of exceptions settled, and for such other relief as may be just.

Dated at this..... day of

Yours, etc.,

A. B.,

Defendant's Attorney.

To B. C., *District Attorney.....county.*

No. 212.

Order enlarging time to settle bill of exceptions, under Code Criminal Procedure, § 460.

(Title of cause and court.)

On reading and filing affidavit of....., defendant's attorney, hereto annexed, and, on motion of the same, it is hereby ordered, on good cause shown, that defendant's time for preparing and serving a bill of exceptions be and is hereby extended to and including....., 1882.

Dated this.....day of... ..

A. B.,

Justice Supreme Court.

No. 213.

Affidavit for new trial, under Code Criminal Procedure, § 465, subdivision 7

COURT OF OYER AND TERMINER.

THE PEOPLE
against

}

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that he resides at, in said county; that he is the attorney for the above named defendant, and as such attorney tried his case under the indictment charging him with arson at the present term of this court, at which he was found guilty by a jury as charged in said indictment. Deponent further says that since said trial closed he has discovered such new evidence as, in his judgment, if produced and received before, would have changed the verdict to one of acquittal; that said evidence is in substance as follows: [here give nature of the evidence briefly]; that said evidence was wholly unknown to him and this deponent at the trial just had, and that their failure to produce it was not owing to any want of diligence on their part.

Subscribed and sworn before me, }
this day of 1882. }

.....
.....

No. 214.

Affidavit on motion for arrest of judgment, under Code Criminal Procedure, § 469.

(Title of court and case.)

STATE OF NEW YORK, } ss.:
..... COUNTY.

....., being duly sworn, says that he resides at, in said county; that he is the attorney for, the defendant in this action; that said was tried on an indictment charging him with arson, before this court and a jury, on the and was found guilty by said jury as charged on the same day.

Deponent further says that said indictment does not conform to the requirements of sections 275 and 276 of the Code of Criminal Procedure in the following particulars: [state in what it is defective]; and also that the facts therein charged do not constitute a crime.

Subscribed and sworn before me, }
this day of }

.....
.....

No. 215.

Notice to district attorney of motion in arrest of judgment.

(Title of court and cause.)

SIR— Please to take notice that on the indictment herein, on the evidence taken in the trial of this action, on the annexed affidavit, and upon all other proceedings heretofore had in this case, I will move the court on the day of for an order arresting judgment against said defendant and for such other relief as may be just.

Dated at this day of

Yours, etc.,

A. B.,

*Attorney for Defendant.*To B. C., *District Attorney*, ... *County*.

No. 216.

Bench warrant after conviction, under Code Criminal Procedure, § 477.

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

[SEAL.] *To any sheriff, constable, marshal or policeman of this State:*

A. B. having been on the day of duly convicted in the court of of the county of, of the crime of [designating it];

You are therefore commanded forthwith to arrest the above-named A. B., and bring him before that court for judgment; or, if the court have adjourned for the term, you are to deliver him into the custody of the sheriff of the county of, or in the city and county of New York to the keeper of the city prison of the city of New York.

Dated at this day of

By order of the court.

E. F., *Clerk*

No. 217.

Warrant of commitment after conviction, under Code of Criminal Procedure, § 487.

(Title of Court.)

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To and to the keeper of the jail or
prison to which the prisoner is sentenced:

Whereas, ... was on the day of, duly tried before me and a jury, and by said jury was convicted of the crime of and afterwards was, by me, in due form of law, sentenced to

imprisonment in the county jail for the term of one year [or fine and imprisonment, as the case may be]. Now, this is to command you to receive the said into your custody and detain him until the judgment of the said court is satisfied.

Dated this day of 188..

A. B.,
Justice Supreme Court (or other court.)

No. 218.

Death warrant, under Code of Criminal Procedure, § 491.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

To the sheriff of the county of.....in the State of New York:

Whereas, At a court of oyer and terminer, held in and for the county of at the court-house, at.....in said county, on the.....day of....., John Doe received sentence of death for the offense of having murdered....., in said indictment mentioned, and having, on the.....day of..... been found guilty of said offense by the verdict of a jury.

Now, it is hereby ordered that execution of the said sentence be made upon him, the said....., on Friday, the.....day of....., between the hours of ten o'clock, A. M., and three o'clock P. M., of that day, by hanging the said..... by the neck until he be dead, within the walls of the prison of the said county of.....

Given under my hand and seal, this.....day of.....

[L. s.]

A. B.,
Justice Supreme Court.

No. 219.

Certificate of execution.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

We, the sheriff of county, and other public officers and persons required by law to be present, and whose names are hereto subscribed, do certify that, who was sentenced by the court of oyer and terminer, held in and for the county of, on the day of, to be executed this day, between the hours of ten o'clock A. M. and three o'clock P. M., was at the time mentioned executed by hanging by the neck until he was dead, within the walls of the prison of said county; and we, the undersigned, do certify that we witnessed the execution, and that the same was conducted and performed in conformity to the provisions

of the law of this State concerning capital punishment, and of the said sentence.

Dated this day of , 188..

.....

Sheriff.

.....

County Judge.

.....

District Attorney

.....

Surrogate.

No. 220.

Notice of appeal, under Code of Criminal Procedure, § 522.

COURT OF OYER AND TERMINER—COUNTY OF

THE PEOPLE
against

}

To, Clerk and District Attorney of county :

SIR.—Please to take notice that the defendant herein hereby appeals to the general term of the supreme court from the judgment of conviction rendered against him in this court on the day of 188..

Dated this day , 188..

A. B.,

Attorney for Defendant.

No. 221.

Notice of appeal by the people, under Code of Criminal Procedure, § 524.

(Title of court and cause as above.)

To....., Defendant, or A. B., Attorney for Defendant :

SIR.—Please to take notice that the people hereby appeal to the general term of the supreme court from the judgment of this court, allowing defendant's demurrer to the indictment, rendered the day of.....

Dated this day of , 188..

A. B.,

District Attorney of County

No. 232.

Affidavit for publication of notice of appeal, under Code of Criminal Procedure § 534.

(Title of court and case.)

STATE OF NEW YORK, } ss. :

COUNTY OF

....., being duly sworn, says that he is district attorney of the county of; that at a term of the court of held in and for the county of on the day of 188.., judgment was rendered allowing the demurrer to the indictment interposed by this defendant; that the people have appealed from said judgment; that said defendant cannot be found, after due diligence, so as to make service upon him of the notice of this appeal; that the attorney who acted for the defendant on the argument of said demurrer, does not reside or transact business in the county of

Subscribed and sworn before me, }
this.....day of..... }

.....
.....

No. 233.

Order of publication, under Code of Criminal Procedure, § 534.

(Title of court and names of parties.)

On reading and filing the affidavit of, hereto annexed, and on motion of, district attorney of the county of, it is hereby ordered that the notice of appeal on behalf of the people be served on, the defendant herein, by publishing the same in the a daily paper published at, in the State of New York, for the space of weeks, in each issue thereof.

Dated this day of, 188..

A. B.,
Justice Supreme Court.

No. 234.

Affidavit of publication, under Code of Criminal Procedure, § 535.

STATE OF NEW YORK, } ss. :

COUNTY OF

....., being duly sworn, says that he is the publisher and proprietor of the daily, published at that the annexed notice of appeal was published in each issue of said paper for the space of weeks, commencing on the day of.....

Subscribed and sworn before me, }
this.....day of..... }

.....
.....

FORMS TO THE CODE

No. 225.

Certificate of judge that there is reasonable doubt, etc., under Code Criminal Procedure, § 537.

(Title of court and of cause.)

STATE OF NEW YORK, }
COUNTY OF } ss.:

I, ..., who presided at the trial of, the above named defendant, on an indictment charging the said with the crime of, and who was convicted of said crime by a jury on said trial, on the day of, 188., do hereby certify that in my opinion there is reasonable doubt whether said judgment should stand.

Dated at this day of, 188..

A. B.,
Justice Supreme Court.

No. 226.

Notice of application for certificate on appeal, under Code Criminal Procedure, § 529.

(Title of court and of case.)

SIR.—Please to take notice that the defendant herein will apply to Hon., the judge who presided at the trial wherein he was convicted of the crime of, for a certificate that there is a reasonable doubt as to whether or not the judgment of said court should stand, pursuant to section 527 of the Code of Criminal Procedure.

Dated at, this day of, 188..

A. B.,
Defendant's Attorney.

To B. C., *District Attorney of county.*

No. 227.

Notice of argument, under Code Criminal Procedure, § 537.

(Title of court and of case.)

To *District Attorney of county:*

SIR.—Please to take notice that defendant's appeal in the above entitled action will be brought on for argument before this court at the next general term thereof, to be held at, in the city of, on the day of, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated at, this day of, 188..

Yours, etc.,

A. B.,
Defendant's Attorney.

No. 228.

Order of reversal and ordering a new trial, under Code Criminal Procedure, § 542.

At a general term of the supreme court of the State of New York, held in
and for the judicial district of said State, at, on
the day of

PRESENT — Hon. }
 " } *Justices.*
 " }

THE PEOPLE
against

This cause having been heretofore, on the day of,
brought on for argument, and after hearing Mr.,
Esq., of counsel for defendant, and, district
attorney of county for the people, and the court having
deliberated thereon,

It is ordered and adjudged that the judgment of conviction in the above
entitled action be reversed [or as the case may be], and that said defendant
..... have a new trial, which is hereby ordered; and
it is further ordered, the proceedings herein be and the same are hereby
remitted to the court of oyer and terminer of county.

A. B., *Clerk.*

No. 229.

*Order of justice as to notice to be served on district attorney on application for
bail, under Code of Criminal Procedure, § 560.*

(Title of court.)

THE PEOPLE
against

An application having been this day made to me by the above-named
defendant for his admission to bail on the charge of,
upon which he has been held by me, .. and the
said defendant having shown good and sufficient reasons for a notice of less
than two days to the district attorney of his application for admission to bail;

I do hereby order that a notice of be served on the
district attorney of county of the application of the
defendant for admission to bail on said charge.

Dated at, this day of, 188..

.....

Police Justice (or Justice of the Peace).

FORMS TO THE CODE

No. 230.

Certificate denying application to bail, under Code of Criminal Procedure,
 §§ 561, 562.

(Title of court.)

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

....., police justice [or justice of the peace]
 of the, do hereby certify
 that an application was made to me on the day of 188...
 for the admission to bail of, held by me to
 answer the crime of, and I denied the said
 application.

Dated at, this day of 188..

.....

Police Justice (or Justice of the Peace).

No. 231.

Certificate of granting application to bail, under Code of Criminal Procedure,
 §§ 561, 562.

(Title of court.)

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

I, ..., police justice [or justice of the peace]
 of the city of, do hereby certify that an application was,
 on the day of, 188..., made to me for the admission
 to bail of, held by me to answer the crime of
, and I did grant the said application and fix
 the sum in which bail may be taken at hundred
 dollars, with suret

Dated at .. this day of 188..

.....

Police Justice (or Justice of the Peace).

No. 232.

Undertaking of bail, under Code of Criminal Procedure, § 563.

(Title of court.)

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

An order having been made on the day of by
 a justice of the peace [or police justice] of
 the town of, that be held to
 answer upon a charge of [stating briefly the nature of the charge], upon
 which he has been duly admitted to bail in the sum of dollars;

We, ..., defendant [if the defendant] join in the undertaking of [stating his place of residence and occupation] and of by occupation and of by occupation sureties, hereby undertake that the above named shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the process of the court, and if convicted, shall appear for judgment and render himself in execution thereof; or if he fail to perform either of these conditions, that he will pay to the people of the State of New York the sum of dollars.

Dated at, this day of, 188..

.....

No. 233.

Justification of sureties, under Code of Criminal Procedure, § 572.

STATE OF NEW YORK, } ss.:
 COUNTY }

On this day of, 188.., before me, the subscriber, appeared, to me personally known to be the same persons described in and who executed the within undertaking, and severally acknowledged that they executed the same.

.....
Police Justice (or Justice of the Peace).

STATE OF NEW YORK, } ss.:
 COUNTY OF }

..... and being severally sworn, each for himself says, the said, that he is a resident and holder within the of, in the State of New York, and that he is worth the sum of hundred dollars, exclusive of property exempt from execution, and that his property consists of and the said for himself, says that he is a resident and holder within the of, in the State of New York, and that he is worth the sum of hundred dollars, exclusive of property exempt from execution, and that his property consists of

Subscribed and sworn before me, }
 this day of, 188.. }

.....
Police Justice (or Justice of the Peace).

No. 234.

Order allowing or disallowing bail, under Code of Criminal Procedure, § 575.

THE PEOPLE
against

I do hereby the bail given by the defendant in the above action before me, on the day of, 188..

Dated at, this day of, 188..

.....
Justice of the Peace (or Police Justice)

No. 235.

Order for discharge of prisoner on giving bail, under Code Criminal Procedure, § 576.

To the sheriff of the county of

....., who is detained by you on a commitment, to answer a charge for the crime of....., having given sufficient bail to answer the same, you are commanded forthwith to discharge him from your custody.

Dated at this day of, 188..

.....
Police Justice (or Justice of the Peace) of the city of

No. 236.

Undertaking after indictment for misdemeanor, under Code Criminal Procedure, § 581.

..... COURT, }
COUNTY OF } ss.:

An indictment having been found on the day of, 188. in the court of of the, charging with the crime of, and he having been duly admitted to bail in the sum of hundred dollars.

We, ..., defendant, and, of, in the county of, by occupation a, and ... of, in the county of, by occupation a sureties, hereby jointly and severally undertake that the above-named... shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted; and shall at all times render himself amenable to the orders and process of the court; and if convicted, shall appear for judgment, and render... self in execution thereof; or if... fail to perform either of these conditions, that we will pay to the people of the State of New York the sum of..... hundred dollars.

Dated at, this day of, 188..

.....
(Justification of sureties same as in No. 233.)

No. 237.

*Certificate of surrender of bail, under Code of Criminal Procedure, § 590.*STATE OF NEW YORK, } ss.:
COUNTY OF

I hereby certify that, the surety given on the arrest of, charged with the crime of has this day surrendered him, in exoneration of himself as bail, by delivering him into my custody, together with a certified copy of the undertaking given by the said surety.

Dated at this day of, 188..

A. B.,
Sheriff of the County of

No. 238.

*Deputation of bail to arrest principal, under Code of Criminal Procedure § 591.*STATE OF NEW YORK, } ss.:
COUNTY OF

I, ..., of surety on the undertaking of charged with the crime of, hereby depute, authorize and empower, in my place and stead, ..., of the county of, to take, arrest, secure and surrender to the sheriff of the county of, in the State of New York, the said named in the copy of the undertaking hereto annexed, in exoneration and discharge of my undertaking as aforesaid, and to employ such persons and assistance as may be necessary to effect that purpose.

Dated at this day of 188..

Witness: B. C.

A. B.

No. 239.

Order remitting forfeiture of bail, under Code of Criminal Procedure, § 597.

At a special term of the county court of the county of ... held at the chambers of Hon on the ... day of

Present, ..., Judge of County.

IN THE MATTER OF THE ESTREATED RECOGNIZANCE
OF

On reading and filing the affidavits and notice of motion of said, with proof of due service thereof, and after hearing, Esq., in support of said motion, and, district attorney of county, in opposition thereto, it is now, on motion of said hereby ordered, that the said order estreating the said recognizance and direct-

ing the same to be prosecuted, be vacated and set aside, and that [if action has been begun] the action commenced thereon by the district attorney of said county be discontinued, upon the payment by said of the costs and expenses incurred therein, amounting to the sum of

A. B.,
County Judge.

No. 240.

Similar order entered at same term of court, at which bail was estreated, under Code of Criminal Procedure, § 594.

At a term of the court of sessions, held in and for the county of....., at the court-house in the city of , on the day of.....

Present — Hon....., County Judge.

A. B..... } Justices of Sessions.
C. D..... }

THE PEOPLE
against

The recognizance of the above-named defendant with, as bail, having been estreated at the present term of the court of sessions of this county, and the said having renewed his bail for his appearance at the next court of sessions, now, on motion of....., Esq., counsel for, it is hereby ordered that the order estreating said bail above-mentioned, and any order for the prosecution thereof, be vacated without costs.

A. B.,
Judge of County.

No. 241.

Complaint upon estreated recognizance.

COURT OF OYER AND TERMINER — COURT.

THE PEOPLE
against

} Complaint.

The plaintiffs complain against the defendant above-named, and show to the court that on the day of, at, in the State of New York, in said county, a certain indictment was pending undetermined in the court of oyer and terminer, against the said defendant, for arson in the first degree [state the facts and circumstances with particularity]; and thereupon the said defendant personally came before Hon....., he being authorized and empowered to lawfully act in the premises, and then and there before the said judge duly entered into a recognizance, by which they and each of them acknowledged themselves indebted to the State of New York in the sum of, which

said recognizance was and is subject to a certain condition, which condition was, that if the said defendant, should personally appear at the next court of, which was to be held in and for the county of, on the day of, then and there to answer said indictment, and also to answer what should then and there be charged against him on behalf of said people, and should not depart therefrom until discharged by said court, then the said recognizance should be void, other wise to remain and be of full force and effect, according to the terms thereof now remaining on record in the office of the clerk of county;

And the said plaintiffs further allege that the said court of, and the term thereof to which the said was recognized by these defendants to appear, was duly held as in said recognizance specified, to wit, on the day of, at the court-house in the city of

And the plaintiffs further say that at said term of court, held as aforesaid, the said indictment then and there pending undetermined in said court before the judge thereof, the said failed in the performance of the said recognizance in this, to wit, that the said being then and there called in open court, and during the sitting of said court, on said day of, as aforesaid, did not appear in said court to answer said indictment, but wholly failed and made default; whereupon an order was made and entered by the said court forfeiting the said recognizance, and directing the same to be prosecuted according to law.

And the said plaintiffs further say that the defendants in this action have not paid the said sum of dollars so as aforesaid acknowledged by them to be indebted to the said plaintiffs, nor any part thereof, and the said plaintiffs say that said recognizance remains in full force and effect, and in no manner reversed, vacated or satisfied.

Wherefore the plaintiffs demand judgment against the said defendants for the sum of dollars, besides costs.

A. B.,

District Attorney in and for the County of

COUNTY OF, ss.:

....., being duly sworn, says that he is district attorney of the county of and plaintiffs' attorney in this action, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Subscribed and sworn before me, }
this day of..... }

.....

.....

No. 242.

Order for recommitment after forfeiture of bail, under Code of Criminal Procedure, § 600.

[Name of Court.]

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any sheriff, constable, marshal or policeman of this State:

Whereas, It appears to the satisfaction of the court that was indicted by the grand jury of the county of on the day of for the crime of, and was duly recognized to appear at the court of, held in and for the county of, at, on the day of.....

And Whereas, It also appears that he wholly failed and made default in appearing;

Now this is to command you forthwith to arrest the said and to deliver his body to the sheriff of the county of, to be detained until legally discharged.

Dated at, this day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 243.

Undertaking of bail upon recommitment, under Code of Criminal Procedure, § 605.

..... COURT, } ss.:
COUNTY OF

An order having been made on the... .. day of..... 188.. by the court of..... that..... be admitted to bail in the sum of dollars, in an action pending in that court against him in behalf of the people of the State of New York, upon an..... we defendant..... surety of..... in the county of..... State of New York, by occupation a..... and surety of..... in the county of..... State of New York, by occupation a hereby jointly and severally undertake that the above-named..... shall appear in that or any other court in which his appearance may be lawfully required upon that..... and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof, or if he fail to perform either of these conditions, that we will pay to the people of the State of New York, the sum of dollars.

Dated at... .. this..... day of..... 188..

In the presence of

.....
Police Justice (or Justice of the Peace).

(Justification of sureties as in No. 233.)

No. 244.

Subpoena to investigate whether crime committed.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.
To

Having reason to suppose an offense has been committed, and for the purpose of investigating whether it has been committed,

You are commanded to appear before me one of the police justices [or justices of the peace] of the at the police court room in said city, on the day of 188.. at o'clock in the noon, as a witness for that purpose.

Dated at this day of 188..

.....
Police Justice (or Justice of the Peace).

No. 245.

Subpoena duces tecum, under Code of Criminal Procedure, §§ 612, 613.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.
To

You are commanded to appear before one of the police justices [or justices of the peace] of the at the court room in said on the day of 188.., at o'clock in the noon, as a witness in a criminal action prosecuted by the people of the State of New York against and you are required also to bring with you the following :

Dated at this day of 188..

.....
Police Justice (or Justice of the Peace).

No. 246.

Subpoena, under Code of Criminal Procedure, § 612.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To

You are commanded to appear before one of the police justices [or justices of the peace] of the at the court room, in said on the day of 188.., at o'clock in the noon, as a witness in a criminal action prosecuted by the people of the state of New York, against

Dated at this day of 188..

.....
Police Justice (or Justice of the Peace).

No. 247.

Return to the service of subpoena, under Code Criminal Procedure, § 615.

COUNTY OF ss.:

I.....hereby make return that I did on the....day of.....
.....at.....in the county of.....State of New York, serve
the within subpoena on.....by delivering it to and leaving the
same with him.

Dated at.....this.....day of.....188..

A. B.,
Policeman.

No. 248.

Affidavit to obtain order to examine witness conditionally, under Code Criminal Procedure, § 622.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

.....being duly sworn says that he resides at.....
that at the last term of the court of.....in and for the county
of.....he was indicted on a charge of arson; that immediately
after said indictment, he gave bail to appear at the next term of said court to
be held at the court house in the on the....day of.....
That.....who resides at.....in the county of.....
is acquainted with all of the facts of the case, and his evidence is very
material to deponent's defense in this action. That said.....
above named is in such an enfeebled and infirm state of health that there is
great probability that he will be unable, by reason of such infirmities, to attend
the trial of this cause at the time and place above-named or at any subse-
quent time.

Sworn before me, this }
....day of..... }

No. 249.

Order to examine witness conditionally, under Code Criminal Procedure, § 622

SUPREME COURT — COUNTY OF

THE PEOPLE
against

On reading and filing the affidavit of the above-named defendant,
hereto annexed, and on motion of....., Esq., his
attorney, it is hereby ordered that.....
....., residing at, in the county
of, be examined conditionally before me on the.....day of

....., 188., at the residence of said.....
 in the county aforesaid; and that a copy of the order and of the annexed
 affidavit be served on the district attorney of the county of.....
 on or before the..... day of

Dated at, this..... day of, 188..

A. B.,

Justice Supreme Court

No. 250.

COMPROMISE OF MISDEMEANOR.

*Acknowledgment of satisfaction by prosecutor, under Code of Criminal
 Procedure, § 664.*

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

I,....., of the town of....., county
 of....., State of New York, do hereby acknowledge to have
 received of, of the same place, the sum of
dollars in full satisfaction for the injury to me at
 said town of....., on the day of.....
 by said....., in assaulting and beating me, and for
 which assault and battery I made complaint, on oath, on the..... day of
, before....., one of the justices of
 the peace [or other officer], and which said complaint is now pending and
 undetermined; and I desire that no further proceeding be had against said

(Signed)

COUNTY OF....., ss. :

I hereby certify that, on this..... day of, before me
 personally appeared.. of,
 in said county, personally known to me to be the same person mentioned in
 and who executed the foregoing acknowledgment of satisfaction; and he
 acknowledged the execution of the same.

A. B.,

Justice of the Peace.

No. 251.

Warrant to discharge defendant from custody when he is imprisoned, under Code of Criminal Procedure, § 663.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To the keeper of the common jail of said county :

Whereas, ..., upon whose oath John Doe was arrested for assault and battery against the said, and was duly committed to your charge on the day of, and who now remains under your care;

And Whereas, The said has duly executed an acknowledgment of satisfaction for said assault before me;

Now, this is to command you forthwith to discharge the said John Doe from your custody in said jail, unless detained upon some other warrant of commitment.

Dated at, this day of, 188..

A. B.,
Justice.....

No. 252.

Order discharging recognizance on settlement of case.

COUNTY OF, ss.:

The within-named complainant, having this day appeared before me, ..., a justice of the peace of the county of, and acknowledged in writing that he had received full satisfaction of the within-named John Doe, for the injury complained of, I do hereby order the within recognizance to be discharged.

Dated at....., this day of, 188..

A. B.,
Justice.....

No. 253.

Summons to corporation, under Code Criminal Procedure, § 676.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To

You are hereby summoned to appear before me at the court room, in the , on the day of, 188.., at o'clock in the..... noon, to answer a charge made against you upon the information of, for

Dated at, this day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 254.

Affidavit of serving summons on corporation, under Code of Criminal Procedure, § 677.

STATE OF NEW YORK, } ss.:
COUNTY OF

....., being duly sworn, says that on the day of , 188.., at, in the county of, State of New York, he served the within summons upon, president [or other officer] of said [giving corporate name], by delivering a true copy thereof to and leaving the same personally with the said

Subscribed and sworn before me, }
this day of, 188. }

.....
Justice of the Peace (or Police Justice).

No. 255.

Indorsement on deposition, under Code of Criminal Procedure, §§ 678, 679.

COUNTY OF, ss.:

I hereby certify that there is sufficient cause to believe the above-named defendant guilty of the offense charged.

Dated at the day of, 188..

A. B.,
Justice of the Peace (or Police Justice).

No. 256.

Order directing jury to be summoned, under Code of Criminal Procedure, § 702.

(Name of court.)

THE PEOPLE
against

To any marshal of the city of, and to any constable of the county of

We command you, that you summon twelve good and lawful men qualified to serve as jurors, and not exempt from such service by law, and who shall be in no wise of kin either to the complainant or the defendant, to be and appear before the court, to be held at the court-room, in the in and for the, on the day of , 188.., to make a jury for the trial of the complaint, charge and offense against the above-named ... , wherein he is charged with, then and there to be tried before the said court. Whereof fail not.

Dated at, this day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 257.

List of persons summoned as jurors, under Code of Criminal Procedure, § 704.

**LIST OF PERSONS SUMMONED AS JURORS PURSUANT TO
ANNEXED ORDER**

.....
.....
.....

I hereby certify that, in obedience to the within order, I have personally summoned the above-named persons as jurors.

Dated at, this day of, 188..

.....
Constable (or Marshal).

No. 258.

Oath of jurors — Special Sessions — under Code of Criminal Procedure, § 711.

You do swear [or do solemnly affirm] that you will well and truly try this issue between the people of the State of New York, and A. B., the defendant, and a true verdict give, according to the evidence

No. 259.

Judgment of court of Special Sessions, under Code of Criminal Procedure, §§ 717, 718.

(Name of Court.)

THE PEOPLE OF THE STATE OF NEW YORK
against

} Judgment..... 125

The defendant was this day convicted, on a trial by the court or a jury, on a plea of guilty, and the court sentenced h.. to imprisonment in the of this county days, and pay a fine of dollars, and be imprisoned until paid, not exceeding days.

.....
Police Justice (or Justice of the Peace).

No. 260.

Certificate of conviction, under Code of Criminal Procedure, § 721.

COURT OF SPECIAL SESSIONS—COUNTY [OR TOWN] OF.....

THE PEOPLE
against
A. B.

} January 25

The above named A. B. having been brought before C. D., justice of the peace of the city [or town of], charged with [describe the offense briefly], and having requested to be tried by a court of special sessions

[or having been required by us to give bail for his appearance at the next court of sessions of this county, and having omitted to do so for the space of twenty-four hours after being so required].

And the above named A. B. having thereupon pleaded not guilty [or guilty], and demanded [or failed to demand] a jury, and having been thereupon duly tried, and upon such trial duly convicted.

We have adjudged that he be imprisoned in the jail of this county..... days, or pay a fine of dollars, and be imprisoned until it is paid, not exceeding.....days [or both, as the case may be].

Dated at, this day of

(Signed)

C. D.,
Justice of the Peace.

No. 261.

Record of conviction on plea of guilty — Trial by Court Special Sessions — under Code of Criminal Procedure, §§ 731, 732.

THE PEOPLE OF THE STATE OF NEW YORK
against

} 188..

The above named.....having been brought before me....., one of the police justices [or justices of the peace] of the....., charged with..... and having requested to be tried by a court of special sessions; and the above named.....having been thereupon duly convicted upon a plea of guilty;.....I have adjudged that he be imprisoned in the.....of the county of.....days, and pay a fine of.....dollars, and be imprisoned until it be paid, not exceeding.....days.

Dated at....., the.....day of..... 188..

.....
Police Justice (or Justice of the Peace).

No. 262.

Record of conviction — Special Sessions (plea of guilty) — no request for trial by court, or bond given to county sessions — under Code of Criminal Procedure, §§ 731, 732.

(Name of Court.)

THE PEOPLE OF THE STATE OF NEW YORK
against

}

The above named.....having been brought before me....., one of the police justices [or justices of the peace] of the....., charged with.....

and not having requested to be tried by a court of special sessions, and having been required by me to give bail for his appearance at the next court of sessions of this county, and having omitted to do so for twenty-four hours after being so required, and the above named having been thereupon convicted upon a plea of guilty..... I have adjudged that he be imprisoned in the.....of the county of.....days, and pay a fine of..... and be imprisoned until it be paid, not exceeding.....days.

Dated at....., the.....day of.....188..

.....
Police Justice (or Justice of the Peace).

No. 263.

Record of conviction — Special Sessions (plea of guilty) — No request for trial by court, or bond given to county sessions — under Code of Criminal Procedure, §§ 731, 732.)

(Name of court.)

THE PEOPLE OF THE STATE OF NEW YORK
against

The above named.....having been brought before me,....., one of the police justices [or justices of the peace] of the.....charged with..... and not having requested to be tried by a court of special sessions, and having been required by me to give bail for his appearance at the next court of sessions of this county, and having omitted to do so for twenty-four hours after being so required, and the above named having been thereupon convicted upon a plea of guilty,. I have adjudged that he be imprisoned in the.....of the county of.....days, and pay a fine of.....and be imprisoned until it be paid, not exceeding.....days.

Dated at , the.....day of.....188..

.....
Police Justice (or Justice of the Peace).

No. 264.

Certificate to add to copy to be delivered to officer as mittimus, under Code of Criminal Procedure, § 735.

STATE OF NEW YORK, } ss.:
COUNTY OF

I certify that I have compared the foregoing with the original certificate made and signed by me as a court of special sessions, and that the same is a correct copy thereof and transcript therefrom, and of the whole thereof.

Witness my hand this day of , 188..

.....
Justice of the Peace of the of in said county.

No. 265.

Commitment to special sessions, under Code of Criminal Procedure, § 784.

(Name of court.)

THE PEOPLE
against

}

The sheriff of the county of is required to receive and detain
....., who stands charged before me for
to answer the charge before a court of special sessions, to be held in the
..... day of, 188..

Dated at, the day of, 188..

.....
Police Justice (or Justice of the Peace).

No. 266.

Undertaking to Special Sessions to be held by Justice, under Code of Criminal Procedure, §§ 786, 787, 788.

STATE OF NEW YORK, { ss. :
COUNTY OF,

..... having been duly charged before.....,
one of the police justices [or justices of the peace] of the.....
with the offense of..... We undertake
that ..he shall appear thereon, from time to time, until judgment at a court
of special sessions, in the....., held by the justice above named, or
that we will pay to the county of..... the sum of two hundred dollars.

Dated at, this..... day of, 188..

Taken, subscribed and acknowledged before }
me, this..... day, 188.., }

.....
Police Justice (or Justice of the Peace) of the City of Albany.
(Justification of sureties as in No. 233.)

No. 267.

Undertaking to Court of Special Sessions to be held by the Recorder, under Code of Criminal Procedure, § 788.

STATE OF NEW YORK, { ss. :
COUNTY OF.... ,

....., having been duly charged before.....
one of the police justices [or justices of the peace] of the city of.....
with the offense of..... We undertake, jointly and

severally, that he shall appear thereon, from time to time, until judgment at a court of special sessions in the... of.....; in said....., or that he will pay to the county of..... the sum of..... hundred dollars.

Dated at this..... day of..... 188..

.....
.....

Taken, subscribed and acknowledged before }
me, the day and year above mentioned. }

.....

Police Justice (or Justice of the Peace).

No. 268.

Attachment against a witness for disobedience of subpoena in a Court of Special Sessions.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

You are hereby commanded to attach....., and bring him before the undersigned, a justice of the peace of said county, at his office in the town of..... county of....., and State of New York, forthwith to testify the truth, according to his knowledge, in an action now pending before the said justice of the peace between the People of the State of New York and John Doe, defendant, on the part of....., and also to answer all such matters as may be brought against him, the said....., for not obeying a subpoena of this court duly served herein.

Dated at....., this..... day of....., 188..

A. B.,
Justice of the Peace.

No. 269.

Attachment against a witness for disobeying subpoena returnable before a police justice in cities.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To

You are hereby commanded to attach....., and bring him before....., the police justice of the city of....., in said county, at the police court-room, forthwith to testify the truth, according to his knowledge, in an action now pending

between the People of the State of New York and John Doe, the defendant, on the part of....., and also to answer all matters that may be brought against him, the said, for not obeying the subpoena of this court, and duly served herein upon him.

Dated at....., this.....day of....., 188..

.....
Police Justice.

No. 270.

Venue for jury in court of Special Sessions.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

You are, hereby commanded to summon twelve good and lawful men qualified to serve as jurors and not exempt from such service by law, and who are in nowise kin to either the complainant.....or..... the defendant herein to be and appear before the undersigned, a justice of the peace [or police justice] of said.....acting as a court of special sessions at his office in the on the...day of..... to make a jury for the trial of said on a charge of and have you then and there this precept together with a list of the jurors by you summoned.

Dated at.....this.....day of.....188..

A. B.,
Justice of the Peace (or Police Justice).

No. 271.

Subpoena by coroner.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

the People of the State of New York to A. B., C. D. and E. F.:

We command you, and each of you, that all excuses and business being laid aside, to appear in your proper persons before the undersigned, one of the coroners of said county of at in said county, on the day of at o'clock A. M. on that day, to give evidence concerning the death of Hereof fail not at your peril.

Dated at....., this..... day of

A. B.
Coroner.

No. 272.

Oath of witness.

You solemnly swear that the evidence which you shall give upon this inquest touching the death of shall be the truth, the whole truth, and nothing but the truth. So help you God.

No. 273.

Oath to interpreter.

You solemnly swear that you will truly interpret to the witness the oath that shall be administered to him upon this inquest, and shall also truly interpret between the coroner, the jury and the witness. So help you God.

No. 274.

Oath to be administered to the foreman of a coroner's jury, under Code Criminal Procedure, § 774.

You do solemnly swear that you will well and truly inquire how and in what manner, and when and where, the person lying here came to his death, and who such person was, and into all the circumstances attending his death, and by whom the same was produced, and that you will make a true inquisition thereof, according to the evidence offered to you or arising from the inspection of the body. So help you God.

No. 275.

Oath to other jurors.

The same oath which A. B., the foreman of this inquest, hath on his part taken, you and each of you do now take, and shall well and truly keep on your parts. So help you God.

No. 276.

Attachment against a witness, under Code of Criminal Procedure, § 776.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To

.....

You are hereby commanded to attach....., and bring him before the undersigned, one of the coroners of said county of....., at the dwelling-house of....., in said county of....., forthwith to testify upon a certain inquest, then and there

to be had upon the body of, and I also to answer for not having answered the subpoena herein, hereto duly served upon him,

Dated at, this day of, 188..

A. B.,
Coroner

No. 277.

Return to attachment of coroner.

COUNTY OF, ss.:

I, ..., hereby certify that I have arrested the within, and have him in my custody now here, as I am within commanded.

Dated at, this day of, 188..

A. B.,
Sheriff.

No. 278.

General form of inquisition.

STATE OF NEW YORK, } ss. :
COUNTY OF

An inquisition taken at in the on the day of, before me one of the coroners of said county aforesaid, on the view of the body of then and there lying dead, upon the oaths and affirmations of A. B., C. D., etc. [giving names of all the jurors], good and lawful men of the State of New York, duly chosen, who being then and there duly sworn and charged to inquire, on behalf of the people of the said State, where, when, how and after what manner the said came to his death, do, upon their oaths and affirmations, say that the said [here state the findings of the jury with particularity].

Dated at, this day of, 188..

(Signed by all the jurors.)

A. B., Coroner.

No. 279.

Examination of witnesses to be attached to the inquisition, under Code of Criminal Procedure, § 778.

STATE OF NEW YORK, } ss. :
COUNTY OF

Examination of witnesses produced, sworn and examined on this day of, at, before, coroner, and A. B., C. D., etc., jurors, good and lawful men of said county, duly summoned and sworn by the said coroner to inquire how and in what manner and when and where came to his death, and who such person was, and into all the circumstances attending such death, and to

make true inquisition, according to the evidence or arising from the investigation of the body.

John Doe, being produced and sworn, says that: [Insert his testimony.]

JOHN DOE.

Subscribed and sworn before me, }
this.....day of.....188... }

A. B., *Coroner.*

Add also evidence of other witness in a similar manner.

I do hereby certify that the testimony of the several witnesses appearing upon the foregoing inquest was reduced to writing by me, and the same subscribed by said witnesses in my presence, and that the said testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated as given by the witnesses respectively.

Dated at this day of..... 188..

A. B.
Coroner.

No. 280.

Coroner's warrant for the arrest of the person charged by the inquisition with murder, under Code of Criminal Procedure, §§ 780, 781.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To any peace officer in this State :

An inquisition having been this day found by a coroner's jury before me, stating that A. B. has come to his death by the act of C. D., by criminal means [or as found by the inquisition].

You are therefore commanded forthwith to arrest the above named C. D., and take him before the nearest and most accessible magistrate in this county.

Dated at this day of..... 188..

E. F.,
Coroner, etc.

No. 281.

Recognisance by witness on coroner's inquest.

RENSSELAER COUNTY, ss.:

Be it remembered that on the day of 188.., A. B., C. D. and E. F., all of the city of Troy, in said county, personally came before me, ..., a coroner of said county, and severally acknowledged themselves to be indebted to the people of the State of New York, each separately, in the sum of dollars, to be made and levied of their goods and chattels, lands and tenements, to the use of said people if default shall be made in the following condition :

The condition of this obligation is such that if the above bounden A. B., U. D. and E. F. shall personally be and appear at the next term of the court of, to be held in and for the county of

on the day of, to give evidence on behalf of said people against for as well to the grand jury as to the petit jury, do not depart the said court without leave, then the recognizance to be void and of no effect, otherwise to remain in full force.

(Signed)

Subscribed and acknowledged before }
me, this.....day of }

G. H., *Coroner.*

No. 282.

Warrant of commitment by coroner.

STATE OF NEW YORK, } ss.:
COUNTY OF, }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To , and to the keeper
of the common jail of said county :

Whereas, ... having been charged upon inquisition taken before me, one of the coroners of said county, with having on the day of, at, feloniously, and of malice aforethought, killed and murdered and the said having been brought before me as such coroner, and after having examined witnesses, and having duly considered the whole matter, and it now appearing to me that the said crime has been committed, and that there is probable cause to believe the said guilty thereof as is stated and set forth in the aforesaid inquisition.

You are, therefore, hereby commanded to forthwith convey and deliver to the said keeper of the said jail the body of the said and you, the said keeper, are hereby required to receive the said into your custody in the said common jail, and him there safely keep until he shall be discharged by due course of law.

Dated at.....this.....day of.....188..

G. H.,
Coroner

No. 283.

District attorney's application to the governor for a requisition for a fugitive from justice, founded upon an exemplified copy of the indictment against the prisoner, under Code of Criminal Procedure, § 827.

To his Excellency, Governor of the State of New York:

Application is hereby made for a requisition against John Doe. That the party complained of, to wit, said John Doe, is a fugitive from justice, and that I believe him to be at this time in the State of That he fled from this State before arrest could be made, and that the ends of justice require that he should be brought back to this State for trial. This

application is based upon an indictment, an exemplified copy of which is hereto annexed. It is affirmatively stated that no other application for a requisition for the same person, for an offense arising out of the same transaction, has been previously made.

I hereby name the State of.....as the State upon which the requisition is asked, and name.....one of the constables of said county of.....as a proper person to whom the warrant is to issue and certify that said.....has no private interest in the arrest of the said fugitive.

Dated at.....this.....day of.....188..

A. B.,
District Attorney, etc.

(Annex exemplified copy of the indictment.)

No. 284.

Affidavit to accompany application for requisition.

STATE OF NEW YORK, } ss.:
COUNTY OF

.....of the.....
in said county, being duly sworn, says that he is a detective in said city; that he knows said John Doe, named in the preceding application and exemplified copy of the indictment; that the said John Doe is a fugitive from justice, and that according to the best knowledge and belief of deponent the said alleged fugitive is at the time of making this application in the village of.....county of.....in the State of.....and that the grounds of such belief are as follows, to wit: [set forth the grounds of deponent's belief.]

J. D.,
Detective.

Subscribed and sworn before me, }
this....day of..... }

.....
.....

No. 285.

Application for a requisition from the governor for the arrest of a fugitive from justice, based upon affidavits.

To his Excellency.....Governor of the State of New York:

Application for a requisition is hereby made against John Doe.

That the party complained of, to wit, said John Doe, is a fugitive from justice, and that I believe him at this time to be in the State of.....; that he fled from this State before arrest could be made, and that the ends of justice require that he should be brought back to this State for trial.

That this application is based upon affidavits, and that hereto annexed is the certificate of the magistrate taking them; that in his opinion the party

making them is to be believed, and that they make a proper case for a requisition.

I further certify that in my opinion if the facts stated in the affidavits are true, they would result in a conviction. That no previous application for a requisition, arising out of this transaction, has been previously made.

I hereby name.....a constable of the city of..... as a proper person to whom the warrant may issue, and I hereby certify that said.....has no private interest in the arrest of said fugitive; and I hereby name the State of.....as the State upon which the requisition is asked.

Dated at.....this.....day of.....188..

A. B.,
District Attorney, etc.

[The affidavit referred to in the preceding application should state all facts and circumstances tending to show that the alleged fugitive has committed the crime charged, and should be such as would justify the issuing of a warrant if within this State.]

No. 286.

Certificate of magistrate to be attached to foregoing application.

I of..... the magistrate before whom the foregoing affidavits were taken, do hereby certify that the parties making them are, in my opinion, to be believed, and that said affidavits present a proper case for a requisition.

Dated at.....this.....day of.....188..

J. D.,
Justice of the Peace (or Police Justice).

No. 287.

County clerk's certificate of official character of magistrate.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

I.....clerk of said county, do hereby certify that J. D., before whom the annexed affidavits were made, and whose names are thereto subscribed, and who has also signed the foregoing certificate, was, at the day of the date thereof, a justice of the peace in and for said county duly commissioned and sworn, and that his signature thereto subscribed is genuine.

In testimony whereof, I have this..... day of.....
[L. a.] subscribed my name and affixed the official seal of said county.

J. K.,
Clerk.

No. 288.

Application to inquire regarding charge of bastardy, under Code of Criminal Procedure, § 840.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

To, a justice of the peace [or police justice] in and for the county of.....

Whereas,..... is pregnant with child likely to be born a bastard, and to become chargeable to the said county of.....[or to a certain town in said county], the undersigned, one of the superintendents of the poor of said county [or an overseer of the poor or officer of the almshouse], hereby makes an application to you pursuant to the statute in such cases made and provided to make inquiry into the facts and circumstances of the case.

Dated at.....this.....day of.....188..

A. B.,
Superintendent, etc.

No. 289.

Examination of a mother of a bastard before birth, under Code of Criminal Procedure, § 841.

STATE OF NEW YORK, } ss.:
COUNTY OF.....

The examination of, of the town of in said county of taken on oath before me, ... a justice of the peace of said county at.....on the day of the said on her oath before me, said that she is now pregnant of a child, likely to be born a bastard and to become chargeable to the county of [or town of], and that of, in said town of, in said county, is the father of said child.

(Signed)

Subscribed and sworn before me, }
this.....day of..... }

A. B.,
Justice of the Peace (or Police Justice).

No. 290.

Examination after birth of child, under Code of Criminal Procedure, § 841.
(Formal part as in No. 289.)

And the said, on her oath before me taken as above stated, says that on the .. day of, at the of, ..., in said county, she was delivered of a male child, which is chargeable to said town of [or county of]

and that, of the town of, in said county, is the father of the said child.

(Signed)

Subscribed and sworn before me, }
this day of

A. B.,
Justice of the Peace (or Police Justice).

NO. 291.

Warrant for the arrest of putative father, under Code of Criminal Procedure, § 841.

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To

Whereas, Upon the application of, a superintendent [or overseer] of the poor of said county [or town], duly made to me, ..., a justice of the peace of said county, I have ascertained by the examination of, of the town of in said county; that she, the said is now pregnant of a child [or was delivered of a child on the day of etc.], which child is likely to become a charge against said county of [or town of], and that of the town of in said county, is the father of said child.

Now, you are hereby commanded forthwith to arrest the said and bring him before me at my office, in the town of in said county of, for the purpose of having an adjudication respecting the filiation of said child likely to be born [or born] a bastard.

Dated at this day of

A. B.,
Justice of the Peace (or Police Justice).

NO. 292.

Indorsement to be made upon the warrant when the putative father is in another county, of the sum in which bond is to be taken, under Code of Criminal Procedure, § 844.

I, ..., the justice of the peace who issued the within warrant, hereby direct that any bond which shall be taken of within named shall be in the sum of dollars.

Dated at this day of

A. B.,
Justice of the Peace (or Police Justice).

No. 293.

Indorsement to be made where warrant is to be executed in another county, under Code of Criminal Procedure, § 843.

STATE OF NEW YORK, } ss.:
COUNTY OF

Due and proper proof upon oath having been made before me a justice of the peace of the county of , that the name of purporting to be subscribed to the within warrant, is in the handwriting of said , the within mentioned justice of the peace, and I do hereby authorize the arrest of the within named in the said county of

Dated at this day of

A. B.,
Justice.

No. 294.

Undertaking to be taken by justice who indorsed the warrant, or by some other justice of the same county, under Code of Criminal Procedure, § 844.

STATE OF NEW YORK, } ss.:
COUNTY OF

Know all men by these presents, that we, A. B. and B. C. and C. D., sureties, all of the town of county of and State of New York, are held and firmly bound to the people of the State of New York, in the sum of for the payment whereof to the said people we bind ourselves, our executors, administrators, jointly and severally by these presents.

Sealed with our seals and dated the day of

Whereas, The above bounden A. B. has been arrested in the said county of, has been arrested upon a warrant issued by, one of the justices of the county of, and indorsed by one of the justices of the peace of said county of, in which warrant the said A. B. is charged with being the reputed father of a bastard child of which was lately delivered [or is about to be delivered] at in said county of Now, therefore, the condition of this obligation is such that if the said shall indemnify the said county of [or town of] and every other county, town or city, which may have incurred any expense or which may be put to any expense for the support of such child or its mother during her confinement and recovery therefrom, against all such expenses, and shall pay the costs of apprehending the said A. B. and of any order of filiation that may be made, then this obligation to be void; other wise to be and remain in full force and virtue.

(Signed)

A. B. [L. a.]
B. C. [L. a.]
C. D. [L. a.]

(Justification of sureties as in No. 288.)

No. 295.

Similar bond for appearance at Sessions, under Code Criminal Procedure, § 844, subdivision 2.

(Formal part as in No. 294.)

Now, therefore, the condition of this obligation is such that if the said shall appear at the next court of sessions to be held in and for the county of. on the. day of., and not depart the said county without its leave, then this obligation to be void, otherwise to remain in full force and virtue.

(Signed as in No. 293.)

(Justification of sureties as in No. 288.)

No. 296.

Certificates to be indorsed upon warrant on discharge, under Code Criminal Procedure, § 845.

COUNTY OF., ss. :

I, ..., a justice of the peace of the county of, before whom the within named A. B. was brought, he having been arrested in said county of., after it had been indorsed by me [or by another justice of said county of.], do hereby certify that the said A. B. has executed a bond, with two sureties, in the sum indorsed upon the warrant, and required according to the statute in such case made and provided, and which is herewith delivered to, the officer who brought the within warrant; and that I have thereupon discharged the said A. B. from arrest upon the within warrant.

Dated at., this. day of., 188..

B. C.,
Justice of the Peace.

No. 297.

Subpoena in bastardy case.

STATE OF NEW YORK, } ss.:
COUNTY OF. }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To A. B., B. C., etc.:

You are hereby commanded that, laying all other matters aside, you and each of you personally appear before. and., justices of the peace of the county of., at the office of, in the., on the. day of. at ten o'clock A. M. on that day, to testify the truth and give evidence, according to your knowledge, touching the father of a bastard child of which has been lately [or is about to be] delivered.

Dated at., this. day of., 188....

(Signed.)

Justice of the Peace

No. 298.

Order of filiation in bastardy case, under Code Criminal Procedure, § 892.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

Whereas, We and , two of the justices of the peace of the county of , have this day, in pursuance of the statute in such case made and provided, upon the application of , one of the superintendents of the poor of the said county of , have convened at the town of in said county , for the purpose of making an examination and determination touching a certain child, of which , of the town of , in said county, is pregnant [or has lately been delivered], and which is likely to become a bastard, and of which is the reputed father;

And Whereas, We have duly examined the said , upon oath, concerning and touching the father of said child, and have also heard all other proofs and allegations in reference thereto, whereby it appears that said child is likely to be born a bastard and become chargeable to the county of , and that the said is the father of the said child.

We therefore, after due examination, hereby adjudge the said to be the father of the said bastard child.

And we, the justices aforesaid, do therefore order that the said do pay to the superintendent of the poor of the county of [or to the overseer of the poor of the town of] for the support of said child, weekly and every week, the sum of dollars, so long as the said child shall continue chargeable as aforesaid.

And Whereas, It also appears that , the mother of said child, is in indigent circumstances, we do further order and determine that the said pay to the said superintendent [or overseer] for the maintenance and support of said , during her confinement the sum of dollars. And we, the said justices aforesaid, do further certify the reasonable costs of apprehending and securing the said father and of this order of filiation at the sum of dollars.

Dated at , this day of , 188..

G. H.,

F. G.,

Justice of the Peace (or Police Justice).

No. 299.

Bond on adjournment in bastardy case, under Code of Criminal Procedure, § 842.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

Know all men by these presents, that we, A. B., B. C., C. D., all of the town of , in the county of , are held and firmly bound unto the people of the State of New York in the sum of dollars,

for the payment of which to said people we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Scaled, etc., and dated this day of, 188..

Whereas, The above named has this day been brought before and two justices of the peace in and for the county of, charged upon the oath of with being the putative father of a bastard child, lately born to her at, and the said justices having convened according to law to examine into the facts and circumstances of the case and adjudicate respecting the filiation of said bastard child, and the maintenance thereof;

And Whereas, At the request of the said, for sufficient reasons given, the said justices have determined to adjourn the said examination and adjudication upon the execution of this bond until the day of at the office of in the town of in said county.

So, therefore, the condition of this obligation is such that if the said shall personally appear before the said justices at the time and place aforesaid, and not depart therefrom without the leave of said justices, then this obligation to be void, otherwise to remain in full force and effect.

(Signed)

A. B. [L. a.]

B. C. [L. a.]

E. F. [L. a.]

Scaled and delivered in presence of

H. B.,

J. D.,

Justices.

(Justification of sureties as in No. 233.)

No. 300.

Warrant of commitment of putative father, under Code of Criminal Procedure, §§ 852, 853.

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To

and to the keeper of the common jail of said county :

Whereas, By an order of filiation, duly made and executed by and before and, two of the justices of the county of, whereby A. B. was adjudged to be the reputed father of a certain bastard child, lately born to, in the town of county of

And Whereas, By said order of filiation the said A. B. was adjudged to pay to the superintendent of the poor of said county the weekly sum of as long as said child should continue chargeable to said county, and also that

the said A. B. should pay to said superintendent the sum of dollars for the maintenance and support of, during her confinement and recovery;

And Whereas, Due notice has been given to said A. B. of said requirements, who has wholly neglected the same, or to enter into a bond to secure the same;

Now you are hereby commanded to arrest and deliver to the keeper of the common jail of the county of forthwith the body of said A. B., and you, the said keeper are hereby commanded to receive and safely keep the said A. B. until he shall pay said costs and sums adjudged against him, give the required bond, or be otherwise discharged by due process of law.

Dated at, this day of, 188..

(Signed)

H. B.,

J. D.,

Justices of the Peace (or Police Justices)

No. 301.

Warrant for discharge of putative father after commitment.

COUNTY OF, ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To the keeper of the common jail of the county of:

Whereas, A. B. was, on the day of, duly committed to your custody on a warrant issued under our hands, for disobeying an order of filiation, whereby he was adjudged to be the putative father of a bastard child, of which was then supposed to be pregnant;

And Whereas, It now appears that said was not in fact pregnant at all [or married before delivery];

Now you are hereby commanded to forthwith discharge from your custody the said A. B., unless he be there lawfully detained on some other warrant.

Dated at, this day of, 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices)

No. 302.

Bond by father under order of filiation.

STATE OF NEW YORK, } ss. :

COUNTY OF,

(Formal part as in No. 299.)

Whereas, ... and two of the justices of the county of have this day made and signed an order of filiation, whereby A. B. is adjudged to be the father of the bastard child of in the town of county of

And Whereas, By said order of filiation it was adjudged that said A. B.

pay to the superintendents of the poor of said county the sum of..... dollars per week while said child remained a charge to said county;

And Whereas, The said A. B. was likewise adjudged to pay to said superintendents the sum of.....dollars for the maintenance and support of the said.....during confinement and recovery and also to pay a certain amount for costs in these proceedings;

Now, therefore, the conditions of this obligation are such that if the said A. B. shall well and truly observe all of the conditions of said order of filiation, then this obligation shall be void, otherwise to be and remain in full force and effect.

Dated at.....this.....day of.....188....

A. B. [L. a.]

C. D. [L. a.]

E. F. [L. a.]

(Justification of sureties as in No. 283.)

No. 303.

Summons to mother of bastard child to show cause why she should not be made to support it, under Code of Criminal Procedure, § 857.

COUNTY OF....., ss.:

To any constable [or other peace officer] of the county of.....

You are hereby commanded to summon.....of the town of.....in the county of.....to appear before.....and.....two of the justices of the peace of said county, at the office of.....in the town of.....on the.....day of....., at ten o'clock A. M. of that day, to show cause why she should not be ordered to support a certain bastard child, of which she was lately delivered at.....and for the keeping of which the county of.....is or is likely to become chargeable, the superintendent of the poor of said county having duly applied to us for that purpose.

Dated at....., this.....day of....., 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices)

No. 304

Order to compel mother to support bastard child, under Code of Criminal Procedure, § 857.

STATE OF NEW YORK, }
COUNTY OF..... } ss.:

Whereas, It satisfactorily appears to the undersigned, two of the justices of the peace of the county of....., that.....who was lately delivered of a bastard child at....., in said county, which

said child has become a charge upon said county; that said.....
is possessed of property in her own right and is of sufficient ability to sup-
port said child.

And Whereas, The said.....in obedience to a summons
duly appeared before us and failed to show cause why she should not be com-
pelled to support said child. Now we, the said justices do hereby order that:
.....pay to the superintendents of the poor of the
said county of....., weekly and every week, the sum of.....
dollars, for the support of said child so long as it remains a charge to said
county.

Dated at....., this.....day of....., 188..

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 305.

Warrant to commit mother of bastard, under Code of Criminal Procedure, § 803.

STATE OF NEW YORK, } ss.:
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

*To any constable [or other peace officer] of the county of, and to
the keeper of the common jail of said county:*

Whereas, By an order heretofore duly made by us
the mother of a bastard child now a charge upon the county of [or town of]
....., was ordered and directed to pay to the superintendent of
the poor of said county the weekly sum of dollars;

And Whereas, The said utterly neglects and
refuses to comply with such order, or to nurse, take care of and support said
child herself;

Now you, the said constable, etc., are hereby commanded to forthwith
arrest the said, and deliver her into the custody of
the keeper of the common jail of the county of; and you,
the said keeper, are hereby commanded to receive into your custody the said
....., and safely keep her, without bail, until she
shall comply with said order, unless she shall execute a bond to the people of
the State of New York in the sum of dollars, with
two good and sufficient sureties, to appear at the next court of sessions
of said county of, and not to depart the said court without
leave.

Dated at..... this..... day of

H. B.,

J. D.,

Justices of the Peace (or Police Justices).

No. 306.

Bond to be given by mother of bastard to appear at Court of Sessions.

(Formal part as in No. 299.)

COUNTY OF ss. :

Whereas, By an order heretofore, on the day of, duly made by, the mother of a bastard child now a charge upon the town of, in said county of [or against said county of], was adjudged to pay the superintendents [or overseers] of the poor of said county of [or town] the weekly sum of dollars for the support of said child, unless she should herself support the same, so that it should not be or become a public charge.

Now the condition of this obligation is such that if the said shall personally appear at the next court of sessions to be held in and for the county of, at the court-house in the county of on the day of, and shall not depart therefrom without leave, then this obligation shall be void, otherwise to remain in full force and effect.

Dated at this day of

A. B.
C. D.
E. F.

Signed, sealed and delivered }
the day of }

H. B.,
J. D.,
Justices.

No. 307.

*Warrant for commitment of mother for refusing to disclose name of father,
under Code of Criminal Procedure, § 856.*

STATE OF NEW YORK, }
COUNTY OF } ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To of the county of, and to
the keeper of the common jail of said county :

Whereas, Complaint has been made before me that one of the town of, in said county of, was delivered of a bastard child on the day of, 1883, which would likely become a charge upon said county.

And Whereas, Said when brought before me refused, and still refuses, to disclose the name of the father of said bastard child, although now sufficiently recovered from her confinement.

Now you, the said constable, etc., are hereby commanded forthwith to convey and deliver the said into the custody of

said keeper; and you, the said keeper, are hereby required to receive the said into your custody in said jail, and her safely keep until she shall testify and disclose the name of the father of said child.

Dated at, this day of, 188..

H. B.,

Justice of the Peace.

No. 303.

Order reducing the amount directed to be paid by the father of a bastard, under Code of Criminal Procedure, § 859.

COUNTY OF, ss.:

Whereas, By an order of filiation, dated the day of and made by us, ...and, two justices of the peace of the county of, it was ordered that A. B., of the town of, in said county, should pay to the superintendent of the poor of said county the weekly sum of dollars in support of a certain bastard child of which he was adjudged to be the father;

And Whereas, After further examination into the facts and circumstances surrounding the case, circumstances surrounding the said child seem to us to render it expedient and proper that the sum required to be paid by the said, by our former order, should be reduced; and we do hereby reduce the weekly payment to the sum of dollars.

Dated at, this day of, 188..

H. B.,

J. D.,

Justices of the Peace

No. 309.

Warrant for the seizure of the property of an absconding father, under Code of Criminal Procedure, § 860.

STATE OF NEW YORK, } ss. :
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To the superintendent of the poor of the county of [or to the overseers of the town of]:

Whereas, It appears to us by evidence on oath that A. B., lately adjudged by us in an order of filiation to be the father of a certain bastard child, lately born to one, at, in the county of

And Whereas, The said A. B. was adjudged in said order to pay to the superintendent of said county the weekly sum of, for the support of said child;

And Whereas, It further appears by proof on oath that said has absconded from the said county of, leaving the said bastard child a public charge on said county;

And Whereas, The said superintendent has applied to us for our warrant to serve the estate of the said

Now you, the said superintendent of the poor of said county, are hereby authorized and commanded to take and seize the goods, chattels, effects and things in action, of every name and nature, belonging to the said A. B., wherever the same may be found in the said county of....., and you are directed immediately upon such seizure to make an inventory of the property by you taken, and return the same, together with your proceedings under this warrant, to the next court of sessions of the said county of

Dated at, this day of, 188..

H. B.,
J. D.,
Justices of the Peace (or Police Justices).

No. 810.

Notice by superintendent or overseer of the poor that application will be made to the Court of Sessions to increase the amount made payable by the order of filiation.

To A. B.:

SIR. — Please to take notice that I shall make application at the next court of sessions to be held in and for the county of.....at the court-house in the county of.....on the.....day of.....at the opening of court on that day, or as soon thereafter as I may be heard, for an order of said court increasing the sum directed to be paid by the order of filiation, of which the annexed is a copy, for the support of the bastard child therein named; also take further notice that hereto annexed are copies of the affidavits and papers upon which said application will be founded.

Dated at.....this.....day of.....18....

Yours, etc.,

L. R.,
Superintendent, etc.

No. 811.

Notice to be given the superintendents or overseers of a motion to reduce amount named in order of filiation, under Code of Criminal Procedure, § 859.

To L. R., superintendent [or overseer] of the poor:

SIR. — Please to take notice that I shall make application to the next court of sessions to be held in and for the county of.....at the court-house in the county of.....on the.....day of.....at 10 o'clock A. M. of that day, or as soon thereafter as I may be heard, for an order of said court reducing the sum directed to be paid by the order of filiation, of which the annexed is a copy, for the support of the bastard child therein named; also take notice that hereto are annexed the affidavit and papers upon which this application will be founded.

Dated at.....this.....day of.....188....

A. B.

No. 312.

Notice of appeal from an order of filiation, under Code of Criminal Procedure, § 861.

To H. B. and J. D., two justices of the peace of the county of..... and to
L. R., superintendent of the poor, and to..... mother of said child :

You will please to take notice that the undersigned, considering himself aggrieved by the order of filiation, of which a copy is hereto annexed, hereby appeals to..... from said order, and every part thereof, to the next court of sessions, to be held in and for the county of..... on the..... day of.....

Dated at..... this of..... 188.

Yours, etc.,

A. B.

No. 313.

Subpoena on appeal in bastardy case.

..... COUNTY, ss. :

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To A. B., B. C., etc. :

The court of sessions, in and for the county of..... held at the court-house in said county, commands you and each of you to personally appear before said court on the..... day of..... at ten o'clock A. M. on that day, to testify the truth according to your knowledge, in a certain appeal then and there to be heard, from an order of filiation in a bastardy case, heretofore made by..... and..... two of the justices of said county, and whereof you fail not under the penalty of fifty dollars.

Witness..... county judge, this..... day of.....

J. K., Clerk.

No. 314.

District attorneys precept for Oyer and Terminer.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

[SEAL] To the sheriff of the county of.....

Whereas, A court of oyer and terminer and jail delivery is to be held in and for the county of..... at the court-house in the..... on the..... day of.....

We command you, in pursuance of the provisions of the Revised Statutes in such case made and provided,

First. That you summon the several persons who have been drawn in said county of pursuant to law to serve as grand jurors and petit jurors at said court to appear thereat.

Second. That you bring before the said court all prisoners then being in the jail of said county, together with all processes and proceedings in any way concerning them in your hands as such sheriff.

Third. That you make proclamation in the manner prescribed by law,

notifying all persons bound to appear at said court by recognizance or otherwise, to appear thereat, and requiring all justices of the peace, coroners and other officers who have taken any recognizance for the appearance of any person at such court, or who shall have taken any inquisition & examination of any prisoner or witness, to return such recognizance or inquisition and examination to the said court at the opening thereof on the first day of its term.

Witness Hon, justice of the supreme court, this.....
day of

J. K., Clerk.

A. B., District-Attorney.

No. 315.

Proclamation on foregoing precept.

Whereas, A court of oyer and terminer is appointed to be held in and for the county of, on the day of, proclamation is therefore hereby made in conformity to a precept to me directed and delivered by the district attorney of county on the day of, to all persons bound to appear at the said court of oyer and terminer by recognizance or otherwise, to appear thereat, and all justices of the peace, coroners and other officers who have taken any recognizances for the appearance of any person at such court, or who have taken any inquisition or the examination of any prisoner or witness, are required to return such recognizance, inquisition or examination at the opening of the first day of said court.

Dated at, this day of, 188..

J. L.,

Sheriff of the county of

No. 316.

Return to district attorney's precept.

STATE OF NEW YORK, } ss.:
COUNTY OF

I have executed the within precept as I am within commanded, by having duly summoned the jurors drawn for the court mentioned therein to appear thereat, by making immediate proclamation as therein commanded, and causing the same to be published in a public newspaper printed in said county once a week from the receipt of said precept until the time appointed for said court, and by having the prisoners in jail brought before the said court, with all processes and proceedings in any way concerning them in my hands.

Dated at, this day of, 188..

J. L.,

Sheriff of the county of

No. 317.

Calendar of prisoners in jail.

To the Court of, now in session :

I, the undersigned,.....sheriff of the county of....., do hereby certify that the following is a correct list of the prisoners now detained in the jail of said county, the time when each was committed, by what process and the crime charged:

(1) John Doe, committed January 10, 188.., by justices' warrant, charged with burglary in first degree.

[Giving the same regarding all.]

A. B.,
Sheriff of the county of.....

No. 318.

Attachment for disobeying subpoena as for contempt, under Code of Criminal Procedure, § 619.

(Name of court and title of case.)

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
 To

This is to command you and each of you to forthwith attach the body of and bring him before the court of..... now in session at the court-house in the....., then and there to answer for certain contempt in refusing or neglecting to attend the said court and give evidence before said court, according to the terms of a subpoena heretofore issued out of this court, and duly served on him on the day of....., as a witness on behalf of the people of this State [or of the defendant], and have you then and there this writ; and you are further commanded to detain him until he be discharged by the said court.

Dated at....., this.....day of....., 188..

By order of the Court.

J. K., *Clerk.*

To be indorsed:—

Allowed this.....day of....., 1883.

A. B.,
Jus. Sup. Court (or Judge of..... County.)

No. 319.

Order of court where prisoner is acquitted on ground of insanity, under Code of Criminal Procedure, § 454.

COURT OF OYER AND TERMINER.

IN THE MATTER OF JOHN DOE, WHO HAS ESCAPED
CONVICTION ON GROUND OF INSANITY.

Whereas, The jury have acquitted the said John Doe of the crime of, whereof he was charged in the trial now just concluded, on the ground of insanity, duly certified by said jury, which certificate is now on file in the county clerk's office; and this court having thereupon carefully inquired and ascertained whether his insanity still continues, and being fully satisfied his insanity does still continue, it is hereby ordered, in pursuance of the statute in such case made and provided, that the said John Doe be kept in safe custody, and for that purpose be sent to the State Lunatic Asylum at, and the sheriff of the county is hereby empowered and commanded to carry this order into effect, and to take the said to said asylum, to be there kept until discharged by due course of law.

Dated at, this day of, 188..

A. B.,
Justice Supreme Court.

No. 320.

Order of court appointing commission to inquire as to the insanity of prisoner before trial, under Code of Criminal Procedure, § 658.

IN THE MATTER OF

A SUPPOSED LUNATIC.

STATE OF NEW YORK, } ss.:
COUNTY OF

It having been made to appear to me that, a person indicted by the last grand jury of the county of, of the crime of, is a person of unsound mind and wholly irresponsible, I do therefore, in pursuance of the statute in such case made and provided, hereby appoint, M. D., ..., counselor-at-law, and, Esq., all of the county of, a commission forthwith to examine into the mental condition of the said, and make their report thereon to this court, with all convenient speed, and due notice of the time and place of executing this commission be given to the district attorney of this county.

A. B.,
Justice Supreme Court.

No. 321.

Notice to district attorney of executing commission, under Code of Criminal Procedure, § 658.

To Hon. *District Attorney of* *county* :

SIR. — Please to take notice that pursuant to an order of the supreme court of the State of New York, heretofore duly made and filed, the undersigned as commissioners to inquire into the mental condition of John Doe, now confined in jail charged with the crime of will proceed to execute their said commission, at the said jail on the day of 188., at eleven o'clock A. M. of that day.

Dated at this day of 188..

Yours, etc.,

(Signed)

.....
.....
.....

Commissioners.

No. 322.

Inquisition of commissioners on insanity of prisoner, under Code of Criminal Procedure, § 658.

IN THE MATTER OF JOHN DOE, AN ALLEGED
LUNATIC.

STATE OF NEW YORK, }
COUNTY OF } *ss.:*

To the Court of

An inquisition taken the day of 188., before

.....
commissioners duly appointed to inquire into the mental condition of John Doe, now confined in county jail, upon their oaths do hereby report as follows: [Here insert full report of conclusions of commission, with their reasons for such belief.]

(Signed)

A. B.,
C. D.,
E. F.,

Commissioners.

No. 323.

Oath of commissioners in foregoing inquest, under Code of Criminal Procedure, § 658.

You do, each for yourself, swear that you will well and truly inquire whether the prisoner John Doe be of sane or insane mind, and that you will true report make thereof according to the evidence. So help you God.

No. 324.

Engagement of parent, master or guardian of vagrant child, under Code of Criminal Procedure, § 888.

POLICE COURT (OR OTHER COURT).

THE PEOPLE
against

Whereas, The above named, residing in the county of and State of New York, a child of the age of years, having sufficient bodily health and mental capacity to attend the public schools, was, on the day of 188.. found wandering in the streets and lanes of the city of a truant, without any lawful occupation.

And Whereas, Complaint was duly made to, one of the police justices [or justice of the peace] of the city of, against said child therefor.

And Whereas, Said justice did cause a peace officer to bring such child before him for examination on said complaint, and did cause the parent, guardian or master of said child to be summoned to attend such examination;

And Whereas, On such examination the said complaint was satisfactorily established, and the said justice did require the said parent, guardian or master of said child to enter into an engagement, in writing, to the city of, that . he will restrain said child from so wandering about as aforesaid, will keep h... in h.... own premises or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year, until ..he becomes fourteen years old.

Now, this agreement and engagement witnesseth : That the said..... the parent, guardian or master of said child, hereby covenants, promises and agrees, to and with the said city of, that he will restrain said child from so wandering about as aforesaid, and will keep h... in his own premises and in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year, until ..hc becomes fourteen years old.

In witness whereof, I have hereunto set my hand and seal this day of, 188..

..... [L. S.]

Sealed and delivered in presence of

.....

Police Justice (or Justice of the Peace).

No. 325.

Undertaking of parent, master or guardian of vagrant child, under Code of Criminal Procedure, § 888.

..... COURT, }
CITY AND COUNTY OF..... } *et. :*

Whereas, Complaint having been duly made before....., one of the police justices [or justices of the peace] of the city of..... in the county of..... and State of New York, that..... residing in....., in the..... of....., in the county of..... and State of New York, a child of the age of..... years, having sufficient bodily health and mental capacity to attend the public schools, was, on the..... day of....., 188., found wandering in the streets of the said city of....., a truant, without any lawful occupation.

And Whereas, The said justice, on such complaint being made, did duly cause a peace officer to bring such child before him for examination, and did duly cause....., the parent, guardian or master of such child, to be summoned to attend such examination.

And Whereas, such examination was, on the..... day of....., 188., duly had before said justice, and said complaint satisfactorily established.

And Whereas, On the establishment of said complaint, said justice did require the said parent, guardian or master of said child to enter into an engagement, in writing, with..... suret..... in the sum of..... hundred dollars, to the city of..... that ..he will restrain such child from so wandering about as aforesaid; will keep h.... in h.... own premises, or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year until ..he becomes fourteen years old.

Now, therefore, we,....., the said parent, guardian or master, residing in....., county of....., by occupation a....., and....., residing in....., county of....., by occupation a....., and....., residing in....., county of....., by occupation a....., sureties, hereby undertake that the said..... will restrain said child from wandering about the streets of said city of....., a truant, without lawful occupation; will keep h.... in h.... own premises or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year until ..he becomes fourteen years old; or, if he fail to perform either of those conditions, we, the said sureties, will pay to the city of..... the said sum of..... hundred dollars.

Dated at....., the..... day of....., 188..

.....
(Justification of sureties as in No. 323.)

No. 326.

Summons to parent, etc., to attend examination of vagrant child, under Code of Criminal Procedure, § 868.

..... COURT, }
CITY AND COUNTY OF } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
To..... parent, guardian or master of.....

Whereas, Complaint and information on oath has been duly made by
.....of the city of in the county of.....
before me,....., one of the justices of the peace [or police justice]
of the city of....., that on the.....day of.....188...
said.....who is a child between the age of five and fourteen
years, having sufficient bodily health and mental capacity to attend the public
schools, was found wandering in the streets of the city of.....
aforesaid, a truant without any lawful occupation and said.....
has been duly arrested and is now in custody on said charge, and is to be
examined thereon before the said at the police court-room
in the city of....., on the.....day of.....188..
You are hereby summoned and required to attend said examination at the
time and place aforesaid.

Witness the said.....at the city of.....and county aforesaid,
the.....day of.....188....

.....,

Justice of the Peace (or Police Justice).

No. 327.

Certificate of conviction of vagrant, under Code of Criminal Procedure, § 891.

..... COURT, }
CITY AND COUNTY OF } ss.:

I certify that, having been brought before me, charged
with being a vagrant, I have duly examined the charge, and that upon h..
own confession in my presence, or upon the testimony of, by
which it appears that ..h.. is a person....., I have adjudged
that ..h.. is a vagrant.

Dated at....., this day of, 188..

.....

Police Justice (or Justice of the Peace),

No. 328.

Certificate of conviction, under Code of Criminal Procedure, § 903.

..... COURT, }
CITY AND COUNTY OF } ss.:

I certify that, having been brought before me, charged
with being a disorderly person, I have duly examined the charge, and that

upon h.. own confession in my presence, or upon the testimony of,
by which it appears that ..h.. is a, I have adjudged that
..h.. is a disorderly person.

Dated at, this day of, 188

.....

Police Justice (or Justice of the Peace),

No. 329.

Application for order to compel the support of poor relatives, under Code Criminal Procedure, § 915.

To the Court of Sessions of the county of :

We, the overseers of the poor of the town of, in the county of, and State of New York, respectfully show to the court that one John Doe is an indigent person and without the means of necessary support, and is a charge upon the town of, where the said John Doe resides; that William Doe is a son of said John Doe, and is also a resident of the same place, who, although perfectly able, refuses to support the said John Doe, or to contribute thereto. Your petitioners, therefore, pray that an order may issue out of this court, directed to the said William Doe, compelling him, the said William Doe, to provide for the support and maintenance of the said John Doe forthwith.

Dated at, this day of, 188..

A. B.,

B. C.,

Overseers of the Poor of the town of

No. 330.

Notice to person liable to support relatives, under Code Criminal Procedure, § 915.

TO WILLIAM DOE, Esq.:

SIR.—Please to take notice that the undersigned, overseers of the poor of the town of, will apply to the court of sessions of the county of, at the opening of court on the day of, at the court-house in the county of, for an order compelling you to support and maintain one John Doe, and for such other relief as may be just.

Dated at, this day of, 188..

A. B.,

B. C.,

Overseers of the Poor, etc.

No. 331.

Order compelling relatives to support poor person, under Code Criminal Procedure, § 916.

COURT OF SESSIONS—COUNTY OF

IN THE MATTER OF THE APPLICATION OF THE OVERSEERS OF THE POOR IN BEHALF OF JOHN DOE, A POOR PERSON. }

At a term of the court of sessions of the county of....., held at the court-house in and for the county of....., on the..... day of....., 188..

Present—Hon., Judge of.....county.

On reading and filing the application of A. B. and B. C., overseers of the poor of.....county, and on due proof of the service of notice of said application upon William Doe, and after hearing the proofs and allegations of the respective parties, it is hereby ordered that the said William Doe pay to the said overseers, the weekly sum of.....dollars each and every week, for the support and maintenance of the said John Doe, so long as he shall remain and be a charge upon the said town of..... as aforesaid; and that he also pay to said overseers the sum of.....dollars, as and for their costs and expenses in procuring this order.

J. F.,
County Judge.

No. 332.

Complaint against apprentice or servant, under Code of Criminal Procedure, § 927.

STATE OF NEW YORK, } ss.:
COUNTY OF..... }

....., being duly sworn, says that he resides in the city of.....in said county; that one.....is an apprentice lawfully bound to serve him as prescribed by the special statutes in such cases made and provided; that the said..... willfully absents himself from duty without the consent of his master, and refuses to serve this deponent according to his duty.

Subscribed and sworn before me, }
this.....day of.....188.. }

.....

Justice of the Peace (or other officer named in § 927).

No. 333.

Warrant for arrest of apprentice, under Code Criminal Procedure, § 223.

STATE OF NEW YORK, } ss.:
 COUNTY OF..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To any constable [or other peace officer] of the county [or city] of.....

Whereas, Complaint has been this day made to me.....a justice of the peace of the town [or city] of.....in said county by..... against one.....a person regularly apprenticed to the said..... according to law, showing that the said.....has willfully absented himself from duty and refuses longer to serve the said.....

Now this is to command you that you arrest the said.....and forthwith have him before me at my office in the.....of..... on the.....day.....

Dated at.....this.....day of.....188..

A. B.,
Justice of the Peace.

FORMS AND INSTRUCTIONS

UNDER CODE OF CRIMINAL PROCEDURE, TITLE X, PART VI, SECTIONS 941-949.

To District Attorneys:

It is not considered necessary to issue extended instructions or forms for the guidance of district attorneys, who are officers learned in the law — except to promote uniformity of returns from county clerks.

The duties of the district attorney arise under section 941 of Title X, Part VI of the Code of Criminal Procedure, and are not directly related to this office, but with the county clerk of his county. The county clerk is, however, greatly dependent upon the district attorney of his county, for such statements as will enable such county clerk to promptly make an intelligent report to the Secretary of State as to convictions in criminal courts of record.

By section 941 of the Code of Criminal Procedure, the duty is imposed upon the district attorney of the county in which any criminal court of record is held, to furnish, within ten days after the adjournment of said court, to the clerk of such court, such a description of the offense committed by every person convicted of crime, abridged from the indictment, as will be sufficient to maintain the averments relating to such offense, or necessary to be made in an indictment for a second offense.

The object of the law is doubtless chiefly to furnish evidence which will be sufficient, on an indictment for a second offense, to prove the facts of a prior conviction.* A general statement that the defendant was convicted of, say robbery, or any other similar and general description of the offense, will not prove the

* See, also, sections 8, 9 and 10 of article first, title 6, chapter 2, part 4 of the Revised Statutes.

facts necessary to be established on the trial of an indictment for a second or subsequent offense. Such an indictment must aver that the defendant, at a particular court, held at a particular time and place, before persons to be named, was convicted of a specific offense, to-wit, of robbery, first (or second) degree, which must be stated with as much precision and certainty, as to time, place, manner, person on whom committed, and with all the legal requisites and particulars to constitute crime, as in the first indictment. Of course these averments must be sustained by proof; and the description furnished by the district attorney is the proof which the law intends should be adduced. This is done to promote public justice, to save trouble to district attorneys or their successors, in future years, and to avoid the large expense of procuring exemplifications of records of conviction.

These general remarks will, perhaps, be sufficient to guide district attorneys in preparing their statements. But as section 949 of the Code of Criminal Procedure requires the Secretary of State to publish forms and instructions for its execution, such forms and instructions will be herein presented. To furnish forms for all cases of criminal convictions would be a work of unnecessary labor and of no practical utility. All that can be done is to give general directions applicable to the great mass of cases, and a few instances of forms to exemplify the instructions.

Generally speaking, it will be more convenient, and more likely to insure accuracy, to recite the *charging part* of the indictment, omitting only the synonymous words which it sometimes contains. Thus, in a case of *perjury*, where the indictment necessarily contains special averments, the statement of conviction may be in the following form:

John Jackson, having been indicted, for that, at a Circuit of the Supreme Court, held at, etc., in and for the county of _____, on the _____ day of _____, 188____, a certain issue joined in the Supreme Court between Thomas Stiles, plaintiff, and Rebecca Stiles, defendant, in an action for divorce (or other civil action), came on to be tried before said Circuit Court, and a jury of the county then and there duly impaneled and sworn; and that the said John Jackson was then and there produced as a witness by and on behalf of the said Thomas Stiles, and was then and there duly sworn according to law, etc. (reciting the substantial part of the indictment); and having been duly tried by a jury, and found guilty of the offense of which he was so indicted, to-wit, *perjury*; he is thereupon by the court here sentenced to imprisonment in the State prison at Auburn for _____ years.

A similar form will be necessary in stating convictions for *duelling*, *incest*, *rape* and many other crimes, and particularly certain *misdemeanors* in which special averments are necessary to describe the offense.

There are some cases in which an abbreviated form may be adopted, of which the following are examples :

Murder, first degree.—John Jackson, having been duly tried by a jury and found guilty of murder in the first degree, for which he had been indicted, in feloniously killing Thomas Stiles, on the day of , at the town of , in the county of , by feloniously shooting the said Stiles with a pistol loaded with gunpowder and ball, he is sentenced, etc.

Arson in the first degree.—James Jackson, having been duly tried by a jury, and found guilty of arson in the first degree, for which he had been indicted, in willfully and feloniously burning in the night-time, on the day of , at the town of , in the county of , the dwelling-house of John Stiles, in which there was at the time a human being, to-wit: Nancy Stiles, he is sentenced to be imprisoned, etc.

Manslaughter.—James Williams, having been duly tried by a jury, and found guilty of manslaughter in the first degree (or whatever degree was found by the jury), for which he had been indicted, in killing John Doe on the day of , at the town of , in the county of , in the heat of passion, but in a cruel and unusual manner, by stabbing him with a dangerous weapon, to-wit: a knife, he is sentenced to imprisonment in the State prison at Sing Sing for years.

The various degrees of manslaughter depend so much on the circumstances of each case, that, as a general rule, the form of reciting the *charging part* of the indictment, as given before in the case of *perjury*, had better be adopted, as there will be much less liability to mistake.

Rape.—James Jackson, having been duly tried by a jury, and found guilty of rape, for which he had been indicted, in carnally and unlawfully knowing Julia Jones, a female child under the age of ten years, on the day of , at the town of , in the county of , he is sentenced to imprisonment in the State prison at Dannemora for years.

Assault in first degree.—James Thomas, having been duly tried by a jury, and found guilty of shooting a pistol loaded with gunpowder and ball at William Townsend, on the, etc., at the town, etc., with intent to kill the said Townsend, for which he has been indicted, he is sentenced, etc.

Grand larceny, second degree.—John Jackson, having been duly tried by a jury, and found guilty of having on the, etc., at the town, etc., feloniously

taken and carried away one gold watch of the value of twenty-six dollars, the personal property of William Jones, for which offense he has been indicted, he is sentenced to imprisonment, etc.

When the conviction is founded on a plea of confession, the commencement of the form should vary from those before given, and should be stated thus :

John Jackson, having been indicted for grand larceny, second degree, in having on the _____, at the town of, etc., feloniously stolen, taken and carried away one gold watch of the value of twenty-six dollars, the personal property of William Jones, and on being arraigned upon the said indictment having confessed the said offense, and pleaded guilty to said indictment, he is sentenced, etc.

Where there are several counts in an indictment, intended to describe the same offense, the statement of the crime need not be repeated according to the formal variations in the different counts, but should be stated once only, according to the count which was proved on the trial.

The foregoing instructions are addressed more particularly to *district attorneys*, although the same will be useful to clerks of criminal courts, to enable them to prepare entries of judgments if that duty is neglected by the district attorney.

To County Clerks :

The following appear to be the only instructions necessary to be given to *clerks of criminal courts*. (See §§ 942 and 943, Code of Criminal Procedure.)

They are specially requested to report promptly every case of neglect, by a district attorney, to furnish them with the statements required by the statute to be prepared by him.

Every judgment must be entered in the court minutes at the time of the sentence, or before the court adjourns, and the transcript must be sent within twenty days after the adjournment; and if the district attorney has omitted to prepare the statements of the offenses upon which convictions have been had, *the clerk must do it for his own protection*, and submit them to the court before entering them in the minutes.

A transcript may and should contain all the convictions had at the same term or session of the court. The following will be the form of the caption :

Transcript of the entries in the minutes of the Court of Oyer and Terminer (or General Sessions of the Peace) held at the Court-house in the town of , in and for the county of , on the day of , one thousand eight hundred and , by and before Hon. , Justice of the Supreme Court (or Hon. , County Judge of said county), and A. B. and C. D., Esquires, Justices of the Sessions of the county, of all convictions for criminal offenses had at the said court and of the sentences thereon.

It is important that the title of the court and the names of the judges should be given in full.

The minutes of the judgment or conviction and of the sentence are then to be copied separately.

The minutes of the trial are not required by law to be furnished to the Secretary of State, and are of no official use to him, and the practice of some clerks of copying out those minutes containing the names of jurors and witnesses is altogether irregular and unnecessary.

After entering all the convictions and sentences, the following certificate should be added :

I, , clerk of the county of , do hereby certify that the foregoing is a true and correct transcript of all the convictions for criminal offenses had at the Court of , held in and for the said county on the day of , 189 , as entered in the minutes of said court kept by me, as the clerk thereof and of the sentences thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of my office, at , the day of , 188 .

In the city and county of New York, the clerks of the criminal courts will, of course, describe their official character, according to the fact, and the clerks of certain city courts in Brooklyn and Buffalo will also use their official titles in this certificate.

Under section 943 of the Code of Criminal Procedure, it is also required of the clerk of the court to transmit, within twenty days, to the office of the Secretary of State, statements of indictments tried, etc. These should be made under this caption :

Statement of the number of indictments tried at the Court of Oyer and Terminer, held at the Court-house in the town of , in and for the county

of _____, on the _____ day of _____, in the year one thousand eight hundred and _____, by and before Honorable _____, Justice of the Supreme Court of the _____ judicial district, and A. B. and C. D., Justices of the Sessions of the said county, and also the number of indictments pending in the said court against persons who were discharged during the session of the said court without trial.

The whole number of indictments tried at the said court was _____

Of which *one* was for murder, first degree, in which the defendant was found guilty (or was acquitted).

Three for grand larceny, first degree, in two of which the defendants were tried, and in one was found guilty (or was acquitted).

One for assault, first degree, in which the defendant was _____

That the whole number in which convictions were had was _____, and the whole number in which the defendant was acquitted was _____

That the whole number of indictments on which persons were discharged without trial during the session of the said court was _____

Of which _____ was for assault, second degree.

And _____ were for grand larceny, second degree.

[Or, and that no person was discharged at the said court without trial.

I, _____, clerk of the county of _____, and clerk of the Court of Oyer and Terminer, held in and for the county of _____, on the _____ day of _____, 188 _____, do hereby certify that the foregoing is a true and correct statement of the number of indictments tried at the said court, and of the number of indictments against persons who were discharged at the said court without trial.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of my office, at _____, this _____ day of _____, 188 _____.

This form will be varied according to the style and name of the court, whether of General Sessions of the Peace, Oyer and Terminer, Recorder's Court in certain cities named in Code of Criminal Procedure, or otherwise, and according to the official title of the clerk. In case of convictions on plea of guilty the following form may be used:

[Caption as in case of foregoing statement.]

There were also two persons convicted at the said court upon their own confession and plea of guilty, one of whom was indicted for _____, and the other for _____

Convictions in Courts of Special Sessions.

By section 944 of the Code of Criminal Procedure, county clerks are required to transmit to the Secretary of State *copies* of all certificates of convictions by any Court of Special Session filed with them.

The following will be the form of such returns:

A return of copies of all certificates of convictions made by Courts of Special Sessions in the county of _____, filed with the County Clerk of the said county, since the transmission by him of any transcripts of criminal convictions.

The certificates are then to be copied *verbatim*, to which the following certificate should be added :

I, _____, County Clerk of the county of _____, do hereby certify that the foregoing are true and correct copies of all certificates of convictions made by any Court of Special Sessions, and filed in my office within the period above specified.

Given under my hand and seal of office, at _____, this
day of _____ 188 .

The reports of county clerks must be written in a plain hand, so that no mistakes may occur in the filing and recording thereof in the office of the Secretary of State. Any material informality in said reports will compel the Secretary of State to send the same back at the expense of the county clerks for amendment, and the penalty may be enforced as if the same had never been transmitted. Hereafter the statistical year as to criminal returns, will end on the 31st of October, so as to give the necessary time to the Secretary of State to make up his annual report to the Legislature.

The transcripts of convictions and the copies of certificates must be on separate sheets of paper, and should be inclosed in a strong envelope or wrapper, directed to the Secretary of State, and sent by mail or by express at the expense of the county clerk. The fees of county clerks for all services in transmission of transcripts of conviction and reports upon statistics of crime to the Secretary of State, are prescribed by the Revised Statutes of this State.

Local Police Magistrates.

It is respectfully suggested to county clerks, in order to secure prompt and full returns of convictions in Courts of Special Sessions (not of record) before police justices, justices of the peace, etc., that a circular letter sent by each county clerk, to each local magistrate in his county, before who many convictions in Special Sessions may be had, in language and form somewhat as in the subjoined letter, may conduce to favorable results. It is also respectfully suggested, that county clerks inform justices of the

peace, when administering to them the oath of office, or when meeting them at courts, or elsewhere, as to their duties under the Code of Criminal Procedure.

COUNTY CLERK'S OFFICE,
 , 188 . }

To ———, *Justice of the Peace (or Police Justice):*

DEAR SIR — The Code of Criminal Procedure requires the County Clerk to report to the Secretary of State on or before the fifth day in each month, all certificates of convictions made by any Court of Special Sessions (such as your court during the previous month).

Will you please make a monthly statement to the County Clerk from time to time as to all such convictions, and in case there have been no convictions in your court, at any time during the preceding month, then please make and send me a statement to that effect, over your official signature.

As a guide in preparing certificates of convictions, I would also respectfully suggest that law stationers and law blank publishers at Albany, Rochester, New York city and elsewhere, publish blank forms which will aid materially in making up the proper form of certificates of convictions.

Yours respectfully,

A. B.,

County Clerk.

N. B. — Justices of the Peace, Police Justices, etc., in making certificates of conviction, will observe care in properly describing the offense as defined by the Code of Criminal Procedure now in force.

The following blank form of certificate of conviction in Justices' Courts, etc., is recommended for use of local magistrates in reporting convictions to county clerks, or in case the justice has no blank form, he may write out the same adapted to the case :

Certificate of Conviction — General.

COURT OF SPECIAL SESSIONS,

County of

, Town of

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE.

188 .

The above-named John Doe, having been brought before John Johnson, Esq., a Justice of the Peace of the town of , and forming a Court of Special Session, charged with

And the above-named John Doe, having thereupon pleaded guilty and demanded (or failed to demand) a jury, and having been thereupon duly tried, and upon such trial duly convicted , I have adjudged that he be imprisoned in the county jail days, or pay a fine

of dollars, and be imprisoned until it be paid not exceeding days.

Dated at the said town of , the day of , 188 .

File with County Clerk.

Justice of the Peace.

A like form may be used by police justices.

To Sheriffs:

It will be noticed by the provisions contained in the Code of Criminal Procedure, § 946, that within twenty days after the adjournment of any criminal court of record, the sheriff in the county in which such court shall have been held, is required to transmit to the office of the Secretary of State, certain statistics in relation to persons convicted of criminal offenses.

The fees and compensation for services of sheriffs in reporting statistics of crime are a county charge, to be audited by board of supervisors.

Section 949 of the said Code of Criminal Procedure imposes the duty upon the Secretary of State to issue such forms of instruction as he may deem proper and requisite for the execution of the duties therein prescribed.

The following instructions to sheriffs are accordingly given :

First. To all sheriffs transmitting reports which relate only to persons convicted in courts of *record*, the following will be the form of *caption* :

Report of the Sheriff of the county of , to the Secretary of State of the State of New York, respecting the persons convicted of offenses at the Court of General Sessions of the Peace (or at the Oyer and Terminer or any other court of record), held in and for the said county, on the day of , made pursuant to section 946 of the Code of Criminal Procedure.

The following will be the *subjects* of the report :

First. You will state the *name* of the convict, and if he or she has two or more names (or *aliases*), you will state them.

Second. The crime of which *he or she was convicted*, at the court held in your county, such as perjury, rape, etc.

Third. His or her occupation, whether a mariner, tradesman, blacksmith, merchant, lawyer, tailoress, and the like.

Fourth. Age at the time of conviction, and sex.

Fifth. Is he or she married or single.

Sixth. His or her native country.

Seventh. The degree of instruction he or she has received; whether he or she can read and write, or can read only, or whether he or she be entirely uneducated. What opportunities he or she has had of religious instruction.

Eighth. Whether his or her parents, or either of them, are living, and which of them.

Ninth. Whether he or she has formerly been imprisoned for any offense; if any, state it.

Tenth. His or her habits in respect to the immoderate use of ardent spirits.

Eleventh. Any other fact or circumstance in his or her condition, habits or circumstances that you may deem useful to communicate.

This return must be made within *twenty* days after the adjournment of every criminal court of record held in the county, and according to the annexed tabular form marked A, and it should be signed by the sheriff in his official character, and dated at the time of signature.

The opportunities which the jailers and turnkeys have of conversing with the prisoners will generally enable them to acquire the knowledge necessary to make out the statements; and the sheriff should instruct them accordingly, to enable them to do so.

A copy of this pamphlet should be kept in the jails for the information of their keepers. Constables who bring prisoners to the jail will often be able to communicate information upon many of the subjects. The friends and relatives, also, of the convict may have no objection to do the same; and during the trial of the cause, the witnesses will be able to inform the sheriffs generally on all the desired particulars.

With all these means of information, the results will, doubtless, sometimes be imperfect. Still they are ample, and, if faithfully improved, the returns will be almost universally full and accurate.

Second. To the sheriffs named in section 945 of the Code of Criminal Procedure, to-wit: in counties in which a city (or cities) is situated.

In said section 945, it is provided that the sheriffs of the respective counties in which incorporated cities are situated, shall also transmit a statement of the number of persons convicted in Courts of Special Sessions, City Courts and Police Courts in those cities, together with such specifications in each case, as are required by said section. Such returns must be regularly transmitted to

the office of the Secretary of State, on the first day of every month, in order that the same may be fully entered in the annual report required from this office.

This duty, it will be seen, relates to convictions in certain minor City Courts, Courts of Special Sessions and Police Courts held in the various cities of the State. The reports, which should be transmitted to this office on the first day of every month, will be in tabular form, like the annexed, marked B. The form should be printed on ruled paper, the ruling directly opposite the printed matter on the left margin of the report, in order that a systematic report may be had from all the sheriffs alike.

(A.)

FORM OF REPORT CONCERNING PERSONS CONVICTED IN COURTS OF RECORD.

REPORT of the Sheriff of the County of _____ to the Secretary of State of the State of New York, respecting the persons convicted of criminal offenses at the Court of _____, held in and for the said county, on the _____ day of _____, 188 , made pursuant to the 946th section of the Code of Criminal Procedure.

NAME OF CONVICT.	Crime of which convicted.	Occupation.	Sex.	Age.	Social relations.	Place of birth.	Secular instruction.	Religious instruction.	Parents.	Former offenses.	Habits of life.
James Edwards, alias Thomas Smith.	Grand larceny, 1st degree.	Laborer.	Male.	35	Married.	Massachusetts	Read and write.	Had religious instruction.	Father.	Grand larceny, 2d degree.	Intemperate.
Eliza Jones.	Arson, 2d degree.	Tailoress.	Female.	20	Single.	N. Y. State.	Cannot read or write.	Never had religious instruction.	Mother.	None.	Temperate.

Dated at _____,

, 188 .

_____,
Sheriff of the County of _____

(B.)

FORM OF REPORT CONCERNING PERSONS CONVICTED AT COURTS OF SPECIAL SESSIONS.

REPORT of the Sheriff of the county of _____ to the Secretary of State, respecting the persons convicted of criminal offenses at the Courts of Special Sessions, held in and for the city of _____, for the month of _____, 188_, pursuant to section 945, Code of Criminal Procedure.

[Write the offenses in this heading, classifying them in alphabetical order.]	Assault, 3d degree.	Cruelty to animals.	Disord'ly conduct.	Intoxication.	Malicious trespass.	Petit larceny, first offense.	Selling lottery tickets.	Vagrancy.	Violating city ordinance.
Number reported									
Males									
Females									
Under 15 years of age.									
From 15 to 21 years of age									
From 21 to 25 years of age.									
From 25 to 30 years of age.									
From 30 to 40 years of age.									
From 40 to 50 years of age.									
From 50 to 60 years of age.									
Over 60 years of age									
Unknown age.									
Married									
Married and having children									
Single									
Unknown									
Natives of United States									
Natives of Ireland									
Natives of Germany									
Natives of England									
Natives of Scotland									
Natives of France									
Natives of Canada.									
Other foreign countries									
Unknown									
Can read and write									
Can read only									
Cannot read or write									
Unknown									
Had religious instruction									
Never had instruction									
Unknown									
Parents living.									
Father living									
Mother living									
Parents dead									
Unknown									
Before convicted									
Never before convicted									
Unknown									
Temperate									
Intemperate									
Unknown									

Dated at _____, 188_.

Sheriff of the County of _____.

(C.)

FORM OF REPORT FOR COLLECTING PERSONAL STATISTICS.

COURT OF ; }
COUNTY OF ; }
THE PEOPLE }
vs. }

Question — What is your name and occupation ?

Answer —

Question — What is your age ?

Answer —

Question — Where were you born ?

Answer —

Question — Are you married or single ?

Answer —

Question — What religious instruction have you received and in what religious denomination have you received it ?

Answer —

Question — What education have you received ?

Answer —

Question — Are your parents living or dead ?

Answer —

Question — Are you temperate or intemperate.

Answer —

Question — Have you been before convicted, or not, of any crime; if you have, of what crime and where convicted ?

Answer —

_____,
Sheriff of _____ County.

This form is suggested for convenience of sheriffs and justices of peace, etc., in procuring information respecting convictions in Courts of Special Sessions, and in eliciting the information indicated.

The Code of Criminal Procedure, in section 948, prescribes a penalty for neglect of duty upon the part of any county clerk, or sheriff, or magistrate, and the manner of enforcing the same, which the Secretary of State sincerely hopes there may be no occasion to enforce. With an intelligent and prompt compliance on the part of the officials charged with the duty of making reports upon criminal convictions to the office of the Secretary of State, whether in courts of record or Special Sessions, it is believed that a complete and valuable report upon criminal statistics may be annually made from this office to the Legislature.

Respectfully submitted,

FREDERICK COOK,

Secretary of State.

GREAT BRITAIN—EXTRADITION.

1842

TREATY TO SETTLE AND DEFINE BOUNDARIES; FOR THE FINAL SUPPRESSION OF THE AFRICAN SLAVE TRADE; AND FOR THE GIVING UP OF CRIMINALS FUGITIVE FROM JUSTICE.

Concluded at Washington, August 9, 1842; Ratifications exchanged at London, October 13, 1842; Proclaimed November 10, 1842.

* * * * *

ARTICLE X.

It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed: And the respective judges and other magistrates of the two Governments, shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining judge or magistrate, to certify the same to

the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

ARTICLE XI.

* * * The tenth article shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.

1889.

CONVENTION SUPPLEMENTARY TO THE TENTH ARTICLE OF THE TREATY CONCLUDED AUGUST 9, 1842.

Concluded at Washington, July 12, 1889; Ratification exchanged at London, March 11, 1890; Proclaimed, March 25, 1890.

EXTRADITION Convention between the United States of America and Her Britannic Majesty, Supplementary to the Tenth Article of the Treaty, concluded between the same High Contracting Parties on the Ninth day of August, 1842.

Whereas by the Tenth Article of the Treaty concluded between the United States of America and Her Britannic Majesty on the Ninth day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

And whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

The said High Contracting Parties have appointed as their Plenipotentiaries to conclude a Convention for this purpose, that is to say:

The President of the United States of America, James G. Blaine, Secretary of State of the United States;

And Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honorable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States ;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles :

ARTICLE I.

The provisions of the said Tenth Article are hereby made applicable to the following additional crimes :

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money ; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement, larceny, receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.
4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape ; abduction ; child-stealing ; kidnapping.
7. Burglary ; house-breaking or shop-breaking.
8. Piracy by the law of nations.
9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master ; wrongfully sinking or destroying a vessel at sea, or attempting to do so ; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries.

ARTICLE II.

A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try and punish him for an offense of a political character.

No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offense or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

ARTICLE III.

No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

ARTICLE IV.

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offense charged, or being material as evidence in making proof of the crime or offense, shall, so far as practicable, and if the competent authority of the State applied to for the extradition has ordered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

ARTICLE V.

If the individual claimed by one of the two High Contracting Parties, in pursuance of the present Convention, should also be claimed by one of several other Powers on account of crimes or

offenses committed within their respective jurisdictions, his extradition shall be granted to that State whose demand is first received.

The provisions of this Article, and also of Articles II to IV, inclusive, of the present Convention, shall apply to surrender for offenses specified in the aforesaid Tenth Article, as well as to surrender for offenses specified in this Convention.

ARTICLE VI.

The extradition of fugitives under the provisions of this Convention and of the said Tenth Article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

ARTICLE VII.

The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

ARTICLE VIII.

The present Convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the Convention shall come into force.

ARTICLE IX.

This Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

It shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties, and shall continue in force until one or the other

of the High Contracting Parties shall signify its wish to terminate it, and no longer.

In witness whereof the undersigned have signed the same and have affixed thereto their seals.

Done in duplicate at the city of Washington, this twelfth day of July, 1889.

[SEAL.]

JAMES G. BLAINE,

[SEAL.]

JULIAN PAUNCEFOTE.

COMMUTATIONS.

STATE OF NEW YORK:

EXECUTIVE CHAMBER,
ALBANY, *March* 26, 1886. }

The attention of all officers charged with the administration of the criminal law is directed to the provisions of section 697 of the Penal Code, as amended by chapter 68 of the Laws of 1886, which is as follows:

“SECTION 697. Where a convict is sentenced to be imprisoned in a State prison or a penitentiary for a longer period than one year, the court before which the conviction is had must limit the term of the sentence, having reference to the probability of the convict earning a reduction of his or her term for good behavior, as provided by statute, and assuming that such reduction will be earned, so that it will expire between the month of March and the month of November, unless the exact period of the sentence is fixed by law.”

This section, as amended, went into effect March 25, 1886.

The copies of commitments to the various prisons and penitentiaries and the reports of commutation received each month at the Executive Chamber, show that ninety-five per centum of convicts earn the reduction allowed under the provisions of the statute.

The wise and humane intention of the act above quoted, which aims at the release of convicts during the season of mild weather, and when the chances of employment are the best, should be strictly observed.

It is also proper that attention should be directed to section 2 of chapter 21 of the Laws of 1886, which provides that in estimating commutation, all the terms under which a convict is imprisoned shall be construed as one continuing term.

For the convenience of courts, the following tables, showing the amount of commutation which may be earned on a given number of years or fractions thereof, have been prepared and issued.

DAVID B. HILL.

COMMUTATION ON SENTENCES FOR YEARS AND MONTHS FROM 1 TO 35 YEARS INCLUSIVE.

Sentence.			Commutation.			Sentence.			Commutation.			Sentence.			Commutation.		
Yrs.	Mos.		Yrs.	Mos.	Days.	Yrs.	Mos.	Days.	Yrs.	Mos.	Days.	Yrs.	Mos.	Days.	Yrs.	Mos.	Days.
1	1	1	..	1	5	20	8	20	5	5	4	1	6	20	2	5	15
1	1	1	..	2	10	...	9	...	5	5	5	1	7	21	2	5	27
1	1	1	..	3	15	...	9	...	6	6	6	1	8	15	2	6	10
1	1	1	..	4	20	...	9	...	7	7	7	1	9	20	2	6	22
1	1	1	..	5	25	...	10	10	8	8	8	1	10	5	2	6	5
1	1	1	..	6	...	...	10	...	9	9	9	1	11	...	2	7	17
1	1	1	..	7	5	...	11	...	10	10	10	1	12	17	2	8	...
1	1	1	..	8	10	...	11	...	11	11	11	1	13	...	2	8	12
1	1	1	..	9	15	...	11	...	11	11	11	1	14	...	2	8	25
1	1	1	..	10	20	...	11	...	10	10	10	1	15	...	2	9	7
1	1	1	..	11	25	...	11	...	9	9	9	1	16	...	2	9	20
1	1	1	..	12	...	...	11	...	8	8	8	1	17	...	2	9	15
1	1	1	..	13	5	...	11	...	8	8	8	1	18	...	2	9	27
1	1	1	..	14	10	...	11	...	8	8	8	1	19	...	2	9	...
1	1	1	..	15	15	...	11	...	8	8	8	1	20	...	2	9	...
1	1	1	..	16	20	...	11	...	8	8	8	1	21	...	2	9	...
1	1	1	..	17	25	...	11	...	8	8	8	1	22	...	2	9	...
1	1	1	..	18	...	...	11	...	8	8	8	1	23	...	2	9	...
1	1	1	..	19	5	...	11	...	8	8	8	1	24	...	2	9	...
1	1	1	..	20	10	...	11	...	8	8	8	1	25	...	2	9	...
1	1	1	..	21	15	...	11	...	8	8	8	1	26	...	2	9	...
1	1	1	..	22	20	...	11	...	8	8	8	1	27	...	2	9	...
1	1	1	..	23	25	...	11	...	8	8	8	1	28	...	2	9	...
1	1	1	..	24	...	...	11	...	8	8	8	1	29	...	2	9	...
1	1	1	..	25	5	...	11	...	8	8	8	1	30	...	2	9	...
1	1	1	..	26	10	...	11	...	8	8	8	1	31	...	2	9	...
1	1	1	..	27	15	...	11	...	8	8	8	1	32	...	2	9	...
1	1	1	..	28	20	...	11	...	8	8	8	1	33	...	2	9	...
1	1	1	..	29	25	...	11	...	8	8	8	1	34	...	2	9	...

COMMUTATION — (Continued).

Sentence.		Commutation.			Sentence.		Commutation.			Sentence.		Commutation.		
Yrs.	Mos.	Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.
9	8	3	4	10	11	10	4	3	5	14	..	5	5	16
9	9	3	3	22½	11	11	4	3	17½	14	1	13½	5	16
9	10	3	5	5	12	..	4	4	...	14	2	25	6	16
9	11	3	5	17½	12	1	4	4	12½	14	3	7½	6	16
10	..	3	6	...	12	2	4	4	25	14	3	20	6	16
10	1	3	6	13½	12	3	4	5	7½	14	4	3½	6	16
10	2	3	6	25	12	4	4	5	20	14	5	15	6	16
10	3	3	7	7½	12	5	4	6	27½	14	6	27½	6	16
10	4	3	7	20	12	6	4	6	15	14	7	10	6	16
10	5	3	8	2½	12	7	4	6	27½	14	8	23½	6	16
10	6	3	8	15	12	8	4	7	10	14	9	5	6	16
10	7	3	8	27½	12	9	4	7	22½	14	10	17½	6	16
10	8	3	9	10	12	10	4	8	5	15	11	5	6	16
10	9	3	9	22½	12	11	4	8	17½	15	..	12½	6	16
10	10	3	10	5	13	..	4	9	...	15	1	...	6	16
10	11	3	10	17½	13	1	4	9	12½	15	2	25	6	16
11	..	3	11	...	13	2	4	9	25	15	3	7½	6	16
11	1	3	11	12½	13	3	4	10	7½	15	4	20	6	16
11	2	3	11	25	13	4	4	10	20	15	5	15	6	16
11	3	4	..	7½	13	5	4	11	2½	15	6	2½	6	16
11	4	4	..	20	13	6	4	11	15	15	7	27½	6	16
11	5	4	1	2½	13	7	4	11	27½	15	8	10	6	16
11	6	4	1	15	13	8	5	..	10	15	9	22½	6	16
11	7	4	1	27½	13	9	5	..	22½	15	10	5	6	16
11	8	4	2	10	13	10	5	1	5	16	11	17½	6	16
11	9	4	2	23½	13	11	5	1	17½	16	..	...	6	16
11	11	4	2	23½	13	11	5	1	17½	16	1	12½	6	16

[illegible]

COMMUTATION — (Continued).

Sentence.			Commutation.			Sentence.		Commutation.			Sentence.		Commutation.		
Yrs.	Mos.		Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.
80	4	11	11		20	31	7	12	5	27½	32	9	12	11	22½
80	5	12	11		2½	31	8	12	6	10	32	10	13	11	5
80	6	12	11		15	31	9	12	6	22½	32	11	13	11	17½
80	7	12	11		27½	31	10	12	7	5	33	1	13	11	12½
80	8	12	11		10	31	11	12	7	17½	33	1	13	11	12½
80	9	12	11		22½	32	11	12	8	12	33	2	13	11	25
80	10	12	11		5	33	1	12	8	12½	33	3	13	11	7½
80	11	12	11		17½	33	2	12	8	25	33	4	13	11	20
81	1	12	11		12½	33	3	12	9	7½	33	5	13	11	24
81	2	12	11		12½	33	4	12	9	12½	33	6	13	11	15
81	3	12	11		25	33	5	12	10	20	33	7	13	11	27½
81	4	12	11		7½	33	6	12	10	15	33	8	13	11	10
81	5	12	11		20	33	7	12	10	27½	33	9	13	11	22½
81	6	12	11		15	33	8	12	11	10	33	10	13	11	5
81											33		13	11	17½
81											33		13	11	...

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TO

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CHAP. 677.

AN ACT relating to the construction of statutes constituting chapter one of the general laws.

APPROVED by the Governor May 18, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER I OF THE GENERAL LAWS.

THE STATUTORY CONSTRUCTION LAW.

- SECTION 1. Short title; extent of application.
2. Property.
 3. Real property.
 4. Personal property
 5. Person.
 6. Judge.
 7. Lunacy; idiocy.
 8. Gender; number; tense.
 9. Heretofore; hereafter; now.
 10. Last; preceding; next; following
 11. Folio.
 12. Writing; signature.
 13. Seal.
 14. Oath; affidavit; swear.
 15. Acknowledge; acknowledgment.
 16. Bond; undertaking.
 17. Choose; elect; appoint.
 18. Board composed of one person.
 19. Meeting; quorum; powers of majority.
 20. Service of notice upon board or body.
 21. County clerk; register.
 22. Village.
 23. State.
 24. Public holiday; half-holiday.
 25. Year.
 26. Month.
 27. Day; mode of computing days; night-time.
 28. Standard time.
 29. Civil and criminal codes.
 30. Laws of England and of the colony of New York.
 31. Limiting the effect of repealing statutes.
 32. Existing laws included in revision not to be construed as new enactments.
 33. Effect of revision upon laws passed at same session or before revision takes effect.

84. Alterations of titles and head notes.

85. Laws repealed.

86. Time of taking effect.

SECTION 1. Short title ; extent of application.—This chapter shall be known as the statutory construction law, and is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter.

§ 2. Property.—The term property includes real and personal property.

§ 3. Real property.—The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

§ 4. Personal property.—The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. The term chattels includes goods and chattels.

§ 5. Person.—The term person includes a corporation and a joint stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any other state, government or country which may lawfully own property in the state.

§ 6. Judge.—The term judge includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.

§ 7. Lunacy ; idioy.—The terms lunatic and lunacy include every kind of unsoundness of mind except idioy.

§ 8. Gender ; number ; tense.—Words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons ; and, when the sense so indicates, words of the neuter gender may refer to any gender. The term men includes boys and the term women includes girls.

Words in the singular number include the plural, and in the plural number include the singular.

Words in the present tense include the future.

§ 9. Heretofore; hereafter; now.—Each of the terms, heretofore, and hereafter, in any provision of a statute, relates to the time such provision takes effect. The term now in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.

§ 10. Last; preceding; next; following.—A reference to the last or preceding section, or other provision of a statute, means the section or other division immediately preceding, and a reference to the next or following section or other division of a statute means the section or other division immediately following.

§ 11. Folio.—A folio is one hundred words, counting as a word each figure necessarily used.

§ 12. Writing; signature.—The terms writing and written include every legible representation of letters upon a material substance, except when applied to the signature of an instrument. The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

§ 13. Seal.—The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L. S.," opposite the signature.

A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other adhesive substance. An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

§ 14. Oath; affidavit; swear.—The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated.

The term swear includes every mode authorized by law for ad-

ministering an oath. When an affidavit is authorized or required it may be sworn to before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified before whom it is to be taken.

§ 15. Acknowledge; acknowledgment.—When the execution of any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to be filed or recorded in a public office, the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed.

The term acknowledge and acknowledgment, when used with reference to the execution of an instrument or writing other than a deed of real property, includes a compliance with the provisions of this section by either such proof or acknowledgment.

§ 16. Bonds; undertaking.—A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect.

§ 17. Choose; elect; appoint.—The term choose includes elect and appoint.

§ 18. Board composed of one person.—A reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding such office, when but one person is chosen to fill such office in pursuance of law.

§ 19. Meeting; quorum; powers of majority.—Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority or the whole number of such persons or officers shall be a quorum of such board or body, and

a majority of a quorum, if not less than a majority of the whole number of such persons or officers, may perform and exercise any such power, authority or duty. Any such meeting may be adjourned by a less number than a quorum. A recital in any order, resolution, or other record of any proceeding of such a meeting that such meeting had been so held or adjourned, or that it had been held upon such notice to the members, shall be presumptive evidence thereof.

§ 20. Service of notice upon body or board.—When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

§ 21. County clerk; register.—Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county.

§ 22. Village.—The term village means an incorporated village.

§ 23. State; territory.—The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia. The term territory when used generally to include every territory of the United States, includes also the District of Columbia.

§ 24. Public holiday; half-holiday.—The term holiday includes the following days in each year: The first day of January, known as New Year's day; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as memorial day; the fourth day of July, known as independence day; the first Monday of September, known as labor day, and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observance.

The term half holiday includes the period from noon to midnight of each Saturday which is not a holiday.

§ 25. **Year.**—Time shall continue to be computed in this state according to the Gregorian or new style. The first day of each year after the year 1752 is the first day of January, according to such style. For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bisextile or leap year consisting of three hundred and sixty-six days, unless such number of the year is a multiple of one hundred and the first two figures thereof treated as a separate number is not a multiple of four, and every year which is not a leap year is a common year consisting of three hundred and sixty-five days.

The term year in a statute, contract, or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day.

In a statute, contract or public or private instrument, the term year means twelve months, the term half-year six months, and the term a quarter of a year, three months.

§ 26. **Month.**—In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month. A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

§ 27. **Day ; mode of computing days ; night-time.**—A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day. A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday other than a half-holiday must be excluded from the reckoning if it is the last day or an intervening day of any such period of two days. In computing any specified number of days, weeks or months from a specified event, the day upon

which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning.

Night-time includes the time from sunset to sunrise.

§ 28. Standard time.—The standard time throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers, and legal and official proceedings, shall be regulated thereby. Any act required by or in pursuance of law to be performed at or within a prescribed time, shall be performed according to such standard time.

§ 29. Civil and Criminal Codes.—The term Civil Code means the Code of Civil Procedure. The term Criminal Code means the Code of Criminal Procedure.

§ 30. Laws of England and of the colony of New York.—A statute of England or Great Britain shall not be deemed to have had any force or effect in this state since May 1, 1788. Acts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December 29, 1828.

The resolutions of the congress of such colony and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter.

§ 31. Limiting the effect of repealing statutes.—The repeal hereafter or by this chapter of any provision of a statute, which repeals any provision of a prior statute, does not revive such prior provision. The repeal hereafter or by this chapter of any provision of a statute, which amends a provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended. The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected; and all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

§ 32. Existing laws included in revision not to be construed as new enactments.—The provisions of any chapter of the revision of the general laws of which this chapter is a part, so far as they are substantially the same as those of laws existing at the time such chapter takes effect, shall be construed as a continuation of such laws, modified or amended according to the language employed in such provisions, and not as new enactments. References in laws not repealed to provisions of law which are incorporated into any such chapter and repealed shall be construed as applying to the provisions so incorporated.

§ 33. Effect of revision upon laws passed at same session or before revision takes effect.—No provision of any chapter of the revision of the general laws, of which this chapter is a part, shall supersede or repeal by implication any law passed at the same session of the legislature at which any such chapter was enacted, or passed after the enactment of any such chapter and before it shall have taken effect; and an amendatory law passed at such session or at any subsequent session begun before any such chapter takes effect, shall not be deemed repealed, unless specifically designated in the repealing schedule of such chapter.

§ 34. Alterations of titles and head notes.—If the title of any article or other division of a statute, or the head note of a section shall be amended or repealed in the body of the statute, or if a new article or other division having a title, or a new section having a new head note be added to a statute, the corresponding title or head note, if any, in an abstract of contents at the beginning of the article or other division of the statute shall be deemed to be correspondingly amended or repealed, although there be no express reference thereto.

§ 35. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed.

§ 36. Time of taking effect.—This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

	Sections repealed.	
Revised Statutes, part I, chapter 8, title 8	16	
Revised Statutes, part 1, chapter 19, title 1	1, 2, 3, 4, 5	
Revised Statutes, part II, chapter 4, title 2	3	
Revised Statutes, part II, chapter 4, title 3	9	
Revised Statutes, part III, chapter 8, title 17	27	
Revised Statutes, part III, chapter 10, title 4	4	
Revised Statutes, part IV, chapter 2, title 8	16	
Laws 1828, second meeting, 51st session, chapter 20	9, 10, 11	
Laws 1828, second meeting, 51st session, chapter 21	3 and 4	
Laws 1857, chapter 536	3	
Laws 1874, chapter 321	All	
Laws 1877, chapter 466	27	
Laws 1884, chapter 14	All	
Laws 1886, chapter 21	20	
Code of Civil Procedure	29, 788, 960 and subdivisions 6, 7, 8, 15, 17, 21, 22, 23 and 24 of section 3343	
Code of Criminal Procedure ...	955, 956, 957	
Penal Code	261, 500, and subdivisions 9, 10, 11, 12, 13, 14 and 15 of section 718.	

THE
PENAL CODE

OF THE

State of New York.

AS AMENDED,

AND IN FORCE AT THE CLOSE OF THE ONE HUNDRED AND
SIXTEENTH SESSION OF THE LEGISLATURE

1893.

;

ANNOTATED BY
JOHN T. COOK,
OF THE ALBANY BAR.

ALBANY, N. Y.:
H. B. PARSONS, LAW PUBLISHER.
1893.

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THE
PENAL CODE

OF THE
STATE OF NEW YORK.

LAWS 1881, CHAPTER 676.

AN ACT TO ESTABLISH A PENAL CODE.

PASSED July 26, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

PRELIMINARY PROVISIONS.

SECTION 1. Title of Code.

2. Its effect.
3. Definition of "crime."
4. Division of crimes.
5. Definition of felony.
6. Definition of misdemeanor.
7. Objects of the Penal Code.
8. Procedure.
9. Convictions must precede punishment.
10. Jury to find degree of crime.
11. General rules of construction of this act.
12. Of sections declaring crimes punishable.
13. Punishments, how determined.
14. Punishment of felonies when not fixed by statute.
15. Punishment of misdemeanors when not fixed by statute.

SECTION 1. Title of Code.—This act shall be known as the
PENAL CODE OF THE STATE OF NEW YORK.

This Code is intended as "a revision of prior laws in respect to crimes and their punishment, and as a substitute for the scattered and fragmentary legislation which preceded it." *People v. Jaehne*, 108 N. Y. 193; 4 N. Y. Cr. Rep. 479; *Matter of Hallenbeck*, 65 How. Pr. 401; 1 N. Y. Cr. Rep. 437, note.

And is to be construed with reference thereto. *People v. Stevens*, 109 N. Y. 162; *People v. Richards*, 108 id. 144.

And with the presumption that no change was intended unless the statute is explicit and clear in that direction. *People v. Palmer*, 109 N. Y. 110. S. P., *Fitzgerald v. Quann*, 109 N. Y. 445.

Crimes defined thereby and committed after, etc., must be punished according to its provisions and not otherwise. *Matter of Hallenbeck*, 65 How. Pr. 402; 1 N. Y. Cr. Rep. 437; *McTameney Case*, 30 Hun, 506; 13 Abb. N. C. 56 66 How. Pr. 75.

Punishments imposed by previous acts are to be deemed repealed whenever inconsistent with this Code. *Matter of Hallenbeck*, 65 How. 401; 1 N. Y. Cr. Rep. 437; *People v. McTameney*, 30 Hun, 506; 13 Abb. N. C. 56; 66 How. Pr. 75.

It must be construed in connection with provisions of the Code of Criminal Procedure bearing upon the same subject. *People v. Rugg*, 98 N. Y. 551.

§ 2. Its effect.—No act or omission begun after the beginning of the day on which this Code takes effect as a law, shall be deemed criminal or punishable, except as prescribed or authorized by this Code, or by some statute of this State not repealed by it. Any act or omission begun prior to that day may be inquired of, prosecuted and punished in the same manner as if this Code had not been passed.

See Fed. Const., art. 1, § 10, subd. 1. This section abolishes all common-law offenses. Section 719, *post*, is substantially to same effect.

This Code took effect Dec. 1, 1882, § 727, *post*.

This Code contains no general clause repealing prior statutes covering the subject embraced in its provisions. *People v. Jaehne*, 108 N. Y. 193.

Operation of, limited to subsequent offenses. *People v. Raymond*, 33 Hun, 123; *People v. Sadler*, 97 N. Y. 146; 3 N. Y. Cr. Rep. 474; *Darrow v. Family Fund Society*, 42 Hun, 249; *Jaehne v. People*, 128 U. S. 189; 6 N. Y. Cr. Rep. 237; *People v. Mortimer*, 46 Cal. 114.

In *People v. Beckwith*, 108 N. Y. 67; 7 N. Y. Cr. Rep. 146, it was held, that this section does not relate to or include the evidence which may be given, or the degree of proof required to convict, and does not affect the provisions of section 181 of the Code of Criminal Procedure.

But does relate to the punishment. *People v. O'Neil*, 109 N. Y. 261.

The statute (Act 1862, chap. 874, § 8), relating to assault with intent to steal, was not repealed by this Code. *People v. Bernardo*, 1 N. Y. Cr. Rep. 245.

But was by Act, 1886, chap. 593, p. 842. See *People v. Moran*, 54 Hun, 279; 7 N. Y. Cr. Rep. 334.

The provisions of the Revised Statutes relative to contumacious witnesses were not superseded and abrogated by this Code. *People, ex rel. McDonald, v. Keeler*, 99 N. Y. 474; 2 N. Y. Cr. Rep. 108; 33 Hun, 589.

The Code of Criminal Procedure (§§ 899, etc.) also creates offenses and prescribes punishments.

It is a principle of universal jurisprudence that laws civil and criminal must be prospective, and cannot have a retroactive effect. *Van Valkenburgh v. Torrey*, 7 Cow. 252; *Sayre v. Wisner*, 8 Wend. 661; *Van Rensselaer v. Wisner*, 12 id. 490. See 5 Crim. L. Mag. 325; 20 Am. Law Reg. (N. S.) 681.

In *Kring v. State*, 107 U. S. 221; 27 Alb. L. J. 347, it was held, that any law is an *ex post facto* law within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which in relation to that offense or its consequence alters the situation of the party to his disadvantage; and no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed and which existed as a law at the time. It was also held in the same case that the distinction between retrospective laws which affect the remedy or mode of procedure, and those which operate directly on the offense was unsound, where, in the latter case, they affect to his serious disadvantage any substantial right which the party charged with crime had under the law as it stood when the offense was committed.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. *Cummings v. State*, 4 Wall. 277; *Calder v. Bull*, 3 Dall. 388, 390.

Although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal. *Cummings v. State*, 4 Wall. 277. But see *Blann v. State*, 39 Ala. 353.

A statute which simply enlarges the class of persons who may be competent to testify, is not *ex post facto* in its application to offenses previously committed. Such alterations relate to modes of procedure only, which the State may regulate at pleasure and in which no one can be said to have a vested right. *Hopt v. Territory*, 110 U. S. 574.

In *Marion v. State*, 20 Neb. 233; 57 Am. Rep. 325, it was held, that where the law in force at the time of the commission of the alleged offense provided that juries should be the judges of the law, but which law was repealed before the trial, that it was competent for the legislature to make such change, and no error for the trial court to refuse to instruct the jury in the language of the prior law.

In *People v. Mortimer*, 46 Cal. 114, it is said: "It is clear, therefore, that no constitutional difficulty would be encountered in requiring past offenses to be tried under new forms of procedure; and it is equally clear that if such offenses are to be tried only under the old forms, and later offenses under the new, it would or might 'create endless confusion in legal proceedings.'"

Cooley Const. Lim. (4th ed.) at page 381, says: "But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

In 1 Bish. Crim. Proc., § 115, it is said: "It is a doctrine extending through every department of the law, that rights, when vested in individuals, are unchangeable, while the remedies by which those rights are enforced may be varied from time to time at the pleasure of the legislature." See, also, *Jacquins v. Com.*, 9 Cush. 279; *Jones v. Com.*, 12 Cr. Law Mag. 677.

A statute changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequently to the commission of the offense, or the finding of an indictment. *Gut v. State*, 9 Wall. 35.

A change which precludes a defendant from taking advantage of variances on trial for an offense alleged to have been committed prior to such change is legal, if such variances do not prejudice him. *Com. v. Hall*, 97 Mass. 570.

So of a change which authorizes an amendment of indictment; *State v. Corson*, 59 Me. 137; *Lasure v. State*, 19 Ohio St. 43; *State v. Manning*, 14 Tex. 402; or a change from prosecution by indictment to prosecution by information; *People v. Campbell*, Col. ; or one which gives the state additional challenges. *Walston v. Com.*, 16 B. Monr. 15; *State v. Ryan*, 13 Minn. 370; *State v. Wilson*, 48 N. H. 398; *Com. v. Dorsey*, 103 Mass. 412; *Waterford, etc., Turnpike Co. v. People*, 9 Barb. 161. But no change can be made which deprives the accused person of any substantial protection which was established for the purpose of securing a fair trial. *Hart v. State*, 40 Ala. 21.

The rules of evidence, however, or the details of a criminal trial, may be changed as to prior as well as subsequent offenses. *Stokes v. People*, 53 N. Y. 164; *People v. Turner*, 117 id. 233; 15 Am. St. 498.

The prisoner having been indicted for murder, the statute was so amended as to render it illegal to convict him of murder, and without any saving clause, but not so as to affect the crime of manslaughter. He was then tried and convicted of murder. *Held*, that he might be subsequently tried under the same indictment for manslaughter. *Garvey's Case*, 6 Col. 384; 49 Am. Rep. 358. See, also, 45 id. 531, note; 4 Crim. L. Mag. 715.

Any change in the law which goes in mitigation of the punishment is not *ex post facto*. *Strong v. State*, 1 Blackf. 193; *Keene v. State*, 3 Chand. 109; 3 Pinney, 99; *Boston v. Cummings*, 16 Ga. 102; *Woart v. Winnick*, 3 N. H. 473; *State v. Arlin*, 39 id. 180; *Clarke v. State*, 23 Miss. 261; *Maul v. State*, 25 Tex. 166; *McInturf v. State*, 20 Tex. App. 335; *Com. v. Mott*, 21 Pick. 474.

Where it is doubtful whether the change is a mitigation or not the defendant should be permitted to decide for himself. *Herber v. State*, 7 Tex. 70.

In *New York* the rule is that a law changing the punishment for offenses committed before its passage is *ex post facto* and void under the Constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or penal administration as its primary object. *Hartung v. People*, 22 N. Y. 105; *Shepherd v. People*, 25 id. 406; 24 How. 388; *Ratzky v. People*, 29 N. Y. 124; 28 How. 112; *Knuckler v. People*, 5 Park. 212.

An act which repeals all former acts in conflict with it, and imposes a greater punishment than the acts repealed, is *ex post facto* as to crimes committed before it went into effect. *Matter of Medley*, 134 U. S. 160; 41 Alb. L. J. 331; *Matter of Hunt*, 13 S. W. Rep. 145.

A general law for the punishment of offenses, which endeavors to reach by its retroactive operation, acts before committed as well as to prescribe a rule of conduct for the citizen in the future, is void, so far as it is retrospective; but such invalidity does not affect its operation as to future offenses. *Jachne v. People*, 128 U. S. 189; 6 N. Y. Cr. Rep. 237.

A statute which imposes a punishment for acts which were not or may not have been punishable when committed, and for all of said acts adds a new punishment, is *ex post facto* and void. *Matter of Garland*, 4 Wall. 333; 32 How. Pr. 241.

The repeal of a criminal law by an amendatory act which changes the repealed act only by reducing the punishment, where the repeal and re-enactment were intended to continue in force, the uninterrupted operation of the old statute applies to crimes committed before the new act took effect, and the offender may be punished under the law as amended. *Hair v. State*, 16 Neb. 601.

The Constitution of 1875 denied the privilege of voting to those "who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny," etc. The former Constitution contained no such provision. *Held*, that one convicted of larceny in 1871 might be punished, under the above statute, for illegal voting in 1874. *Washington v. State*, 75 Ala. 582; 51 Am. Rep. 479.

In *State v. Moore*, 42 N. J. L. 203; 39 Am. Rep. 558; 24 Alb. L. J. 306, it was held, that a statute extending the time limited for the prosecution of a crime is *ex post facto* and void as to a crime which would have been barred by the original statute.

A statute limiting the time within which indictments must be found is an act of grace and favor on the part of the state, which is to be liberally construed, when construction is required, in favor of the criminal. *People v. Lord*, 12 Hun, 282.

In *Regina v. Inhabitants of Denton*, Dears. Cr. Cas. 3, it was held, that where an act of parliament, upon which an indictment was framed, was repealed after the indictment was found by the grand jury, but before plea pleaded, the judgment must be arrested.

A law shortening the time between sentence and execution of a person condemned to death is void as to previous offenses as an *ex post facto* law. *Matter of Tyson*, 6 L. R. A. 472.

In respect to crimes already committed, a law substituting the state penitentiary for the county jail as the place of confinement and execution of persons sentenced to be hanged is not *ex post facto*. *Matter of Tyson*, 6 L. R. A. 472.

§ 3. **Definition of "crime."**—A crime is an act or omission forbidden by law, and punishable upon conviction by

1. Death; or
2. Imprisonment; or
3. Fine; or
4. Removal from office; or
5. Disqualification to hold any office of trust, honor or profit under the state; or
6. Other penal discipline.

See Anderson's Law Dict. 298; 2 Broom and Had. Com. (Wait's ed.) 832; *McCord v. People*, 46 N. Y. 473; *Calgan v. Wilson*, 127 U. S. 540.

The power of the legislature to enact what shall amount to a crime is "unlimited except in so far as it is restrained by constitutional provisions and guaranties." *People v. Gillson*, 109 N. Y. 406; *People v. West*, 106 id. 295; *Lawton v. Steele*, 119 id. 233.

The terms "crime" and "offense" being declared synonymous terms, the offense of public intoxication created by the excise law is a crime within the meaning of N. Y. Consolidation Act (Laws 1882, chap. 410, § 268). *People, ex rel. Kopp, v. French*, 102 N. Y. 583.

In *People v. Hislop*, 77 N. Y. 335, Church, Ch. J., said: "The intent of the legislature to elevate an act to the importance of a crime cannot be imputed by loose inferences and doubtful implications, but must be made to appear with reasonable certainty. We may guess that the legislature intended to make all prohibited acts criminal offenses, but it is impossible to so affirm with any degree of certainty, and the fact that they did not so declare is indicative that they did not so intend."

It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted. *People v. West*, 106 N. Y. 298, 296.

An "infamous crime" is an offense implying such a dereliction of moral principle as carries with it a conviction of a total disregard of an oath. *People v. Parr*, 42 Hun, 313. See, also, 2 Abb. Nat. Dig. 222; *Matter of Wilson*, 114 U. S. 417; *United States v. Wynn*, 9 Fed. Rep. 386.

An act forbidden by the Constitution is one forbidden by law. *People v. Barber*, 48 Hun, 198.

"Statute" includes a municipal ordinance. *Mayor v. Eisler*, 2 Civ. Proc. Rep. 125.

Where intent is an element it may not be a crime to act under advice of counsel. *People v. Burton*, 1 N. Y. Cr. Rep. 207; 16 W. Dig. 195.

But it must be alleged that the advice was believed and relied upon. *Hamilton v. People*, 57 Barb. 625.

To sustain a defense of entry upon premises under a *bona fide* claim of right, there must be colorable ground for such a claim. *People v. Stevens*, 109 N. Y. 159.

When the doing of a prohibited act is made a crime, the intent is immaterial. *Morris v. People*, 3 Den. 381; *People v. Reed*, 47 Barb. 235; *People v. Adams*, 16 Hun, 549; *Com. v. Weiss*, 139 Penn. St. 247; 23 Am. St. 192.

As to "Intent in Crime," 9 Crim. Law Mag. 139.

A technical assault, without criminal intent, is no crime. *People v. Hale*, 1 N. Y. Cr. Rep. 533; *People v. Hays*, 1 Hill, 551.

When malice necessary to constitute criminal act. See *People v. Reed*, 47 Barb. 235.

Where a statute creates a new offense, by making that unlawful which was before lawful, and prescribes a particular penalty and mode of procedure for collecting it, that penalty alone can be enforced, and the offense is not indictable. *People, ex rel. Hislop, v. Cowles*, 16 Hun, 577; *aff'd*, 77 N. Y. 381.

But where the statute also declares that the offense shall be a misdemeanor, it is indictable. *People v. Stevens*, 13 Wend. 341.

"An illegal act, which is a wrong against the public welfare, seems to have the necessary elements of a crime." Lord Esher, M. R., in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 606.

All acts injurious to private persons, and which tend to produce violent resentment are criminal. *People v. Smith*, 5 Cow. 258.

§ 4. Division of crimes.—A crime is either

1. A felony; or
2. A misdemeanor.

§ 5. Definition of felony.—A felony is a crime which is or may be punishable by either

1. Death; or
2. Imprisonment in a state prison.

If defendant may be punished as provided, it is a felony, although a fine could be imposed. *People v. Lyon*, 99 N. Y. 210; 3 N. Y. Cr. Rep. 166; *Benedict v. Williams*, 48 Hun, 123; *People v. Van Steenburgh*, 1 Park. 39.

Unless it is specifically declared by statute not to be. *People v. Borges*, 6 Abb. Pr. 182.

The above definition of felony must be construed as relating to the punishment prescribed for the crime without reference to any personal exemption of the criminal. *People v. Park*, 41 N. Y. 21.

Offenses under the Peculation Act (Laws 1875, chap. 19) are felonies. *People v. Lyon*, 99 N. Y. 210; *People v. Bork*, 91 id. 5.

§ 6. Definition of misdemeanor.—Any other crime is a misdemeanor.

A misdemeanor is any crime less than a felony, and the terms "felony" and "misdemeanor" are generally used in contradiction to each other. *People v. Finn*, 26 Hun, 60.

The doing of any prohibited act, a punishment for which is not otherwise provided, is a misdemeanor. *People v. Bogart*, 3 Abb. 198.

The case of *People v. Hovey*, 5 Barb. 117, which held that if a husband or wife, divorced on account of his or her adultery, marries again during the life of the innocent party, was guilty of a misdemeanor, was overruled in *People v. Faber*, 92 N. Y. 149; 44 Am. Rep. 357.

§ 7. Objects of the Penal Code.—This Code specifies the classes of persons who are deemed capable of crimes, and liable to punishment therefor; defines the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each.

See *Matter of Hallenbeck*, 65 How. Pr. 401; *People v. McTamney*, 18 Abb. N. C. 56; 30 Hun, 505; 1 N. Y. Cr. Rep. 437; 66 How. Pr. 75.

§ 8. Procedure.—The manner of prosecuting and convicting criminals is regulated by the Code of Criminal Procedure.

Code Crim. Proc., § 4; *People v. Beckwith*, 108 N. Y. 78.

§ 9. Conviction must precede punishment.—The punishments prescribed by this Code can be inflicted only upon a legal conviction in a court having jurisdiction.

See State Const., art. 1, § 1; Code Crim. Proc., § 8.

Conviction is that legal proceeding of record which ascertains the guilt of the party. Bouv. Dict.

The ordinary meaning of the word "conviction" is a finding by the jury of a verdict of guilty. *Matter of Browne*, 7 Crim. L. Mag. 328; *Com. v. Lockwood*, 109 Mass. 323; 12 Am. Rep. 699.

The record of conviction must be before the court to warrant pronouncing judgment. *McNeill's Case*, 1 Caines Rep. 72.

Whether a party accused of a crime be guilty or innocent cannot be determined in an equity action. *Davis v. American, etc., Society*, 75 N. Y. 363.

A verdict of guilty is not alone sufficient to constitute a conviction, it must be followed by judgment and sentence. *Blaufus v. People*, 69 N. Y. 107; 25 Am. Rep. 148. See, also, Whart. Ev. (3d ed.), § 567; *Marion v. State*, 16 Neb. 349.

Defendant was convicted in 1881, in a court of oyer and terminer held by a supreme court justice and two justices of the sessions. Before sentence, defendant sued out a *certiorari* to review the conviction; the conviction was affirmed, and in 1883, at a court of oyer and terminer held by the same persons as was the trial court, defendant was sentenced. Held, that the court was illegally constituted and the sentence void. *People v. Bork*, 96 N. Y. 188.

§ 10. Jury to find degree of crime.—Whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, must find the degree of the crime of which he is guilty.

See *post*, § 35, note.

This section must be construed with, and is qualified and restricted by the provisions of sections 436 and 437 of the Code of Criminal Procedure. *People v. Rugg*, 98 N. Y. 537; 8 N. Y. Cr. Rep. 172.

The finding of the degree of the crime is only essential where the jury find the defendant guilty of a degree other than that charged in the indictment. *People v. Rugg*, 98 N. Y. 537; 8 N. Y. Cr. Rep. 172.

The verdict may be general or special. Code Crim. Proc., §§ 436-438.

Need be in no particular form. Code Crim. Proc., § 440.

May be of a degree inferior to charge or of an attempt. Code Crim. Proc., § 444 Penal Code, § 35; *McNevin v. People*, 61 Barb. 307.

§ 11. General rules of construction of this act.—The rule that a penal statute is to be strictly construed does not apply to this Code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law.

See 2 Crim. Law Mag. 1; *People v. Whedon*, 2 N. Y. Cr. Rep. 818; *Cowley v. People*, 83 N. Y. 468; *Matter of Gutierrez*, 45 Cal. 431; *People v. Soto*, 49 id. 68; *People v. West*, id. 610; *People v. Tisdale*, 57 id. 104; *People v. Bauer*, 37 Hun, 406.

Criminal laws are not to be extended by construction. *Thomas v. Mut. Protective Union*, 49 Hun, 82; *Lamb v. State*, 67 Md. 524; 10 Crim. Law Mag. 95.

In all free countries the criminal law ought to be plain, perspicuous and easily apprehended by the common intelligence of the community. It is the essence of cruelty and injustice to punish men for acts which can be construed to be crimes only by the application of artificial principles according to a mode of disquisition unknown in the ordinary business and pursuits of life. *Lamb v. State*, 67 Md. 524; 10 Crim. Law Mag. 95.

Laws which create crimes ought to be so explicit either in themselves, or by reference to some other standard, that all men subject to their penalties may know what acts it is their duty to avoid. *United States v. Sharp*, Peters C. C. 118.

§ 12. Of sections declaring crimes punishable.—The several sections of this Code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed; but such court may in its discretion suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not

exceed ten years and such person has never before been convicted of a felony.

In effect, as amended, April 4, 1893; Laws 1893, ch. 279.

See *People ex rel. Benton v. Court of Sessions*, 66 Hun, 553; 50 State Rep'r, 234; affirming, 46 id. 255; 8 N. Y. Crim. Rep. 855.

The provisions for appointing a time for pronouncing judgment and what causes may be shown against it are regulated by Code Crim. Proc., § 471 *et seq.* Punishment for second offenses, §§ 688, 689, *post.*

The court may suspend sentence. *People v. Graves*, 81 Hun, 383; *People v. Harrington*, 3 N. Y. Cr. Rep. 141; 15 Abb. N. C. 161; 1 How. Pr. (N. S.) 37; *State v. Addy*, 48 N. J. L. 118; 25 Alb. L. J. 423; *Com. v. Dowdican's Bail*, 115 Mass. 133. See *Miller's Case*, 9 Cow. 370, *Contra*, *People v. Morrisette*, 20 How. Pr. 118.

In Illinois, the circuit courts have decided the question both ways. *People v. Archer*, 18 Chi. L. News, 245; *People v. Mueller*, 4 Crim. L. Mag. 725.

But if the rights or status of the prisoner are changed after the suspension of the sentence, as if the prisoner is under sixteen years of age and may be sentenced to the house of refuge, which does not disfranchise him—after passing that age, he cannot be sentenced under the conviction had before attaining that age. *People v. Harrington*, 15 Abb. N. C. 161; 3 N. Y. Cr. Rep. 141; 1 How. Pr. (N. S.) 37.

The fact that the pardoning power is lodged in the executive does not affect the power of the judiciary to suspend sentence. *People v. Mueller*, 4 Crim. L. Mag. 725.

Where a prisoner has been convicted and sentenced, and duly committed in pursuance of the sentence, the power of the court to revise or change the sentence is at an end. *Brown v. Rice*, 57 Me. 55; 2 Am. Rep. 11.

In *People v. Menesvey* (76 Mich. 223) defendants pleaded guilty to a charge of burglary, and were sentenced each to five years in the state's prison, from and including the day of sentence. Later, on the same day, they attempted to break jail, and the following day they were brought into court, the original sentence set aside, and they were re-sentenced, one for nine and the other for ten years. *Held*, that the first sentence went into effect the day it was pronounced, and that the second sentence was a nullity.

§ 13. Punishments, how determined.—Whenever in this Code, the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars. [*In effect as amended Apr. 25, 1892.*]

If a statute fixes punishment at imprisonment for one year, sentence may be for any time not exceeding one year. *People v. Bauer*, 3 N. Y. Cr. Rep. 438; 37 Hun, 407.

Judgment and sentence must specify place of imprisonment, § 705, *post*.

§ 14. Punishment of felonies when not fixed by statute.—A person convicted of a crime declared to be a felony, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment for not more than seven years, or by a fine of not more than one thousand dollars, or by both.

§ 15. Punishment of misdemeanors when not fixed by statute.—A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both.

This section not applicable to crime of keeping a bawdy house, committed before Penal Code took effect. *People v. Sadler*, 3 N. Y. Cr. Rep. 474.

Upon conviction in courts of special sessions for misdemeanors the punishment is limited to a fine not exceeding fifty dollars or imprisonment not exceeding six months or both. Code Crim. Proc., § 717; *People v. Riseley*, 38 Hun, 280; *People v. Carter*, 48 id. 165.

One convicted of petit larceny is subject to punishment prescribed by this section. *Matter of Hallenbeck*, 65 How. 501; *People v. McTameney*, 30 Hun, 505; 13 Abb. N. C. 56; 1 N. Y. Cr. Rep. 437; 66 How. Pr. 75.

So one who obtains possession of land by means of a criminal fraud. *Loos v. Wilkinson*, 51 Hun, 85.

Selling spirituous liquors illegally is punishable under this section. *Foot v. People*, 56 N. Y. 321.

In *People v. Palmer*, 43 Hun, 408; 5 N. Y. Cr. Rep. 107, although the point was not determined, Bockes, J., was of opinion that the punishment for assault in the third degree was "specially prescribed" by section 717, Code of Criminal Procedure. See *Burns v. Norton*, 35 State Rep'r, 418.

Relator was convicted of assault in the third degree and sentenced to imprisonment in state prison for one year. *Held*, that the offense was punishable only by fine or imprisonment in a penitentiary or county jail; that, as the court of sessions exceeded its jurisdiction, its judgment could not be enforced, but the conviction being valid, relator was not entitled to a discharge on *habeas corpus*, but should be remanded to the custody of the sheriff, to be dealt with according to law. *People, ex rel., v. Kelly*, 97 N. Y. 212; 2 N. Y. Cr. Rep. 437.

TITLE I.

PERSONS PUNISHABLE FOR CRIME.

SECTION 16. What persons are punishable criminally.

17. Presumption of responsibility in general.

18. Presumption of responsibility as to child under seven years.

19. Presumption of responsibility as to child of seven years or more.

20, 21. Irresponsibility, etc., of idiot, lunatic, etc.

22. Intoxicated persons.

23. Morbid criminal propensity.

24. Rule as to married woman.

25. Rule as to persons acting under threats, etc.

26. Rule as to persons acting under threats, when act done in defense of self or another.

27. Exemption of public ministers.

§ 16. What persons are punishable criminally.—The following persons are liable to punishment within the state :

1. A person who commits within the state any crime, in whole or in part;

2. A person who commits without the state any offense which, if committed within the state, would be larceny under the laws of the state, and is afterwards found, with any of the property stolen or feloniously appropriated, within this state;

3. A person who, being without the state, causes, procures, aids or abets another to commit a crime within the state;

4. A person who, being out of this state, abducts or kidnaps, by force or fraud, any person contrary to the laws of the place where such act is committed, and brings, sends or conveys such person within the limits of this state, and is afterwards found therein;

5. A person who, being out of this state and with intent to cause within it a result contrary to the laws of this state, does an

act which, in its natural and usual course, results in an act or effect contrary to its laws.

See 19 Eng. Rep. 538; 28 id. 27.

An indictment for abortion, which charged defendant with doing the act constituting the crime, is sufficient although the proof shows that defendant was absent at the time the crime was committed, but that he counseled, induced and procured its commission. *People v. Bliven*, 112 N. Y. 79.

A citizen of this State, who has entered into a conspiracy to violate its laws, cannot escape punishment because the act he planned was accomplished during his absence from the State. *People v. Lyon*, 1 N. Y. Cr. Rep. 400; 99 N. Y. 219.

Where an offense is committed within this State by means of an innocent agent, the employer is guilty as a principal, and if found within this State may be tried therein, though he did no act in this State and was at the time the offense was committed in another State. *Adams v. People*, 1 N. Y. 173.

And it is no answer to an indictment, that the defendant owes allegiance to another state or sovereignty. *Adams v. People*, 1 N. Y. 173.

A murder committed on board a vessel in Long Island Sound is indictable in this State. *People v. Wilson*, 3 Park. 199.

Under the treaty of 1871, an assault by one German citizen upon another on board a vessel in port is without the jurisdiction of the courts of this State, unless it disturbs the public peace. *People v. Marine Court*, 6 Hun, 214.

It is well settled the penal laws have no extra-territorial force. *Western, etc., Coal Co. v. Kilderhouse*, 87 N. Y. 435.

The courts of this State have no jurisdiction over offenses committed within the United States post-office in the city of New York. *People v. Marra*, 4 N. Y. Cr. Rep. 304.

But have of offenses committed in the United States Navy Yard at Brooklyn, such jurisdiction having been reserved in the act ceding that tract of land to the United States. *People v. Lane*, 1 Edm. Sel. Cas. 116.

"The Element of Locality in The Law of Criminal Jurisdiction," 28 Am. Law Reg. (N. S.) 22. See, also, Code Crim. Procedure, §§ 133-140.

"State Jurisdiction in Tide Waters," 3 Harv. L. Rev. 346.

§ 17. Presumption of responsibility in general.—A person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person, except as otherwise prescribed in this Code.

§ 18. Presumption of responsibility in general, as to child under seven years.—A child under the age of seven years is not capable of committing crime.

4 Black. Com. 22, 23; Broom Leg. Maxims, 232. See 1 Greenl. Ev., § 28; 1 Whart. Crim. Law, § 67; 1 Bish. Crim. Law (6th ed.), § 68; 3 Lawson Crim. Def. 163; *Walker's Case*, 5 City Hall Rec. 137; *People v. Davis*, 1 Wheeler Crim. Cas. 230; *Stage's Case*, 5 City Hall Rec. 177; *Moebus v. Herrman*, 108 N. Y. 358; *Stone v. Dry Dock, etc., R. Co.*, 115 N. Y. 104; 23 St.

Rep. 551; *State v. Aaron*, 7 Am. Dec. 592; *Marsh v. Loader*, 14 C. B. (N. S.) 535; 3 Lawson Crim. Def. 119; *Willet v. Com.*, 13 Bush, 230.

Evidence is not admissible to rebut this presumption. Barb. Crim. Law, 263; 1 Colby Crim. Law, 3.

§ 19. Presumption of responsibility in general, as to child of seven years or more — evidence as to age.— A child of the age of seven years, and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness. Whenever in any legal proceedings it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court or jury to determine the age thereby; and the court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age. A copy of the record of baptism of any child in any parish register, or register kept in a church, or by a clergyman thereof, or a certificate of baptism duly authenticated by the person in charge of such register; or who administered said baptism, and also a transcript of the record of birth recorded in any bureau of vital statistics or board of health, duly authenticated by its secretary or under its seal, and the entries made in a family Bible, shall also be competent evidence upon the question of the age.

See Laws 1888, chap. 145.

The common law presumes an infant under fourteen incapable of committing crime, but this presumption is only *prima facie*. Unless proof of capacity be given, the jury must acquit. *People v. Davis*, 1 Wheel. C. C. 230; *People v. Teller*, id. 231; *People v. Randolph*, 2 Park. Cr. 174; *People v. Walker*, 5 City Hall Rec. 187; *Stage's Case*, id. 177; Barb. Crim. Law, 262; *State v. Tice* (Mo.), 6 West. Rep'r, 677; *State v. Adams*, 76 Mo. 355; *Willet v. Com.*, 13 Bush, 230; *Stone v. Dry Dock Co.*, 115 N. Y. 109.

A charge of felony can be established against an infant of eleven years of age, only by the strongest and clearest proof of his capacity to entertain a criminal intent. *Angelo v. People*, 96 Ill. 29; 36 Am. Rep. 182; 3 Lawson Crim. Def. 123.

A male infant, about twelve years old, put his hand over the mouth of a girl ten years old, while his elder brother attempted to commit a rape upon her. *Held*, not sufficient to warrant his conviction as principal in the second degree. *Law v. Com.*, 75 Va. 885; 40 Am. Rep. 750.

An infant may be convicted of Murder.— *Rex v. York*, Foster, 70; 1 Bennett & Heard Lead. Cas. 71; *Godfrey v. State*, 31 Ala. 338.

Manslaughter.— 1 Arch. Cr. Pl. 18; *Irby v. State*, 32 Ga. 496.

Rape.—If it is proved that he has reached the age of puberty, and is capable of committing the crime. Penal Code, § 279; *Com. v. Green*, 2 Pick. 380.

Felony.—*Angelo v. People*, 36 Am. Rep. 132.

Breach of the peace.—*Bullock v. Babcock*, 3 Wend. 891.

False pretenses.—*People v. Kendall*, 25 Wend. 899; *Doran v. Smith*, 49 Vt. 353.

Nuisance.—An infant of tender age is not responsible for maintaining. *People v. Townsend*, 3 Hill, 479.

Age.—Under the act of 1882, chap. 340, which was incorporated in the above section in 1888 (Laws 1888, chap. 145), a magistrate has the power to determine the age of the child by personal inspection, and he is not obliged to direct an examination by a physician for that purpose. *Matter of Serafino*, 66 How. Pr. 178.

The court may rely upon its own judgment as to the child's age. *People v. Cardillo*, N. Y. Gen. Sess., Jan., 1883. *Contra*, *Shinger v. State*, 53 Ind. 251; 28 Eng. Rep. 516.

The magistrate is justified in disregarding the statement made by the child that he is sixteen years of age if his appearance warrants his belief that he is a child under that age; that being the only evidence, the question of age is one of fact entirely for the magistrate. *Reg. v. Viasani*, 31 Justice of the Peace, 260; 15 L. T. (N. S.) 240; *State v. Arnold*, 13 Ired. 184.

The jury have the right to determine the age by personal inspection and by general appearance in connection with other competent evidence. *People v. Plath*, 8 N. Y. Cr. Rep. 129; reversed on other grounds, 100 N. Y. 590; *People, ex rel. Zeigler, v. Special Sessions*, 10 Hun, 224; *People v. Townsend*, 3 Hill, 479; *People v. Stott*, 4 N. Y. Cr. Rep. 388. *Contra*, *Shinger v. State*, 53 Ind. 251.

"An entry in a family Bible has been considered to derive credit from the circumstances of its being entered in a book which is kept as the ordinary register of families, and as admissible, therefore, on account of its publicity in the family, without proofs that such entry was made by a member of the family. But memoranda inserted in other books, as an album, a missal, prayer book, and any other family documents and papers, have been admitted in evidence to show the fact of date of the birth, marriage or death of a child, or other relative of the family. This latter class of entries, however, should be shown either to have been acknowledged or treated by the relatives as a correct family memorial; or, in the case of ancient writings, at least, that they were made at the period when they purport to have been written." 1 Phillips Ev. 255; 1 Greenl. Ev., § 104.

An entry of the date of the birth of a child, made by the father in a family Bible, is not admissible to prove the date of such birth, where the father is living and no effort to find and produce him is shown. *People v. Sheppard*, 5 N. Y. Cr. Rep. 132; 55 Hun, 565.

An infant may testify as to his own age. *Banks v. Metcalfe*, 1 Wheel. Cr. Cas. 381; *Cheever v. Congdon*, 34 Mich. 296; *Morrison v. Emsley*, 53 Mich. 564; *Central Railroad Co. v. Coggin*, 73 Ga. 689; Whart. Ev. (3d ed.), § 206.

See also as to proof of age, 28 Eng. Rep. 516; 37 id. 702; 37 Alb. L. J. 130; 10 Am. and Eng. Encyc. of Law, 697; Whart. Ev. (3d ed.), §§ 512, 653; Code Civ. Proc., § 933.

§ 20. **Irresponsibility, etc., of idiots, lunatics, etc.**—An act done by a person who is an idiot, imbecile, lunatic or insane, is not a crime. A person cannot be tried, sentenced to any punishment or punished for a crime when he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense.

See notes under next section.

§ 21. **Irresponsibility, etc., of idiots, lunatics, etc.**—A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either,

1. Not to know the nature and quality of the act he was doing; or

2. Not to know that the act was wrong.

For discussions of the subject of insanity as a defense to crime, see 1 N. Y. Cr. Rep. 29; Abbott Trial Brief (Cr. Causes.) 333, 461; 12 Alb. L. J. 150; 13 id. 210; *Guiteau's Case*, 10 Fed. Rep. 161, and notes by Desty and Wharton, 189-204; 1 Crim. Law Mag. 32, 431; 7 id. 431, 567; 12 id. 1; 16 Cent. L. J. 282; 2 Am. and Eng. Encyc. of Law, 658; 4 id. 715; 31 Am. Rep. 360; 35 id. 20; 38 id. 375; 36 id. 462, 795; 45 id. 397; 44 id. 426; 46 id. 778.

Weakness of intellect, not amounting to insanity, is no defense. *Patterson v. People*, 46 Barb. 625; *Wartina v. State*, 105 Ind. 445; *Conway v. State*, 118 id. 482; 11 Crim. Law Mag. 640; *Anderson v. State*, 25 Neb. 550.

A lunatic is responsible for a crime committed during a lucid interval. *Clark's Case*, 1 C. H. Rec. 176.

But where previous insanity is proved, the prosecution must show that the crime was committed during a lucid interval. *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207.

Insanity resulting from intermittent fever, etc. *People v. Beno Ville*, 3 Abb. N. C. 195.

A phrenzy, which is the result of violent passion, will not excuse the commission of a crime. *Pierrovis' Case*, 3 C. H. Rec. 123; *Sanchez v. People*, 4 Park. 535; 18 How. 72; 22 N. Y. 147.

What facts may be given in evidence to show insanity on part of the prisoner. *Lake v. People*, 1 Park. 495.

Moral insanity not recognized as an excuse for crime. 12 Crim. Law Mag. 7; *Charci v. State*, 31 Ga. 424; *Guiteau's Case*, 10 Fed. Rep. 161; 4 Crim. Law Mag. 586; *Boswell v. State*, 63 Ala. 307; 35 Am. Rep. 20; 2 Crim. Law Mag. 32; *People v. Kerrigan*, 73 Cal. 222; *State v. Potts*, 100 N. C. 457.

See, however, *People v. Kleim*, 1 Edm. Sel. Cas. 18; *People v. Devine*, id. 594; *People v. Pine*, 2 Barb. 566; *Krom v. Schoonmaker*, 3 id. 467.

It is no defense that in consequence of an uncontrollable influence a prisoner had no power over his will. *Walt's Case*, 50 How. Pr. 204.

If a person retains the use of his reason, there is no such thing as uncontrollable impulse to commit crime. *Waltz's Case*, 50 How. Pr. 204. See, also, 4 Crim. Law Mag. 586; *Bolling v. State*, 16 S. W. Rep'r, 658.

Where the evidence has disclosed no circumstance indicating that the crime was committed under the influence of provocation at the time or sudden anger, it is not error to exclude evidence that the accused was irascible and subject to fits of passion from slight cause. *Sindram v. People*, 88 N. Y. 196

Where the defense is that defendant was an epileptic, and that the homicide was the unconscious result of epileptic mania as bearing upon the issue so presented, the absence of motive is important. *People v. Barber*, 115 N. Y. 475.

As to what facts necessary to excuse an epileptic, see *Stauderman's Case*, 3 Abb. N. C. 187; *Jenisch's Case*, id. 200.

Evidence that the prisoner's father was afflicted with epilepsy, and that epilepsy is hereditary, is competent in murder case. *Walsh v. People*, 88 N. Y. 458.

Insanity cannot change the crime of homicide from one degree to another. *Sindram v. People*, 1 N. Y. Cr. Rep. 148; affirmed, 88 N. Y. 196.

One mentally deranged so as not to be able to conduct his defense cannot be tried. *Peacock v. State*, 50 N. J. L. 34.

The doctrine of irresponsibility for a crime committed by a person who had sufficient mental capacity to comprehend the nature and quality of his act and to know that it was wrong, on the ground that he had not the power to control his actions, is not the law of this State. *Walker v. People*, 83 N. Y. 86; 1 N. Y. Cr. Rep. 27; *People v. Coleman*, id. 1; *Casey v. People*, 31 Hun, 158; 2 N. Y. Cr. Rep. 187; *People Walworth*, 4 id. 355; *People v. Carnell*, 2 Edm. Sel. Cas. 200; *Willis v. People*, 82 N. Y. 715; 5 Park. 621; *Flanagan v. People*, 52 N. Y. 467; *Wagner v. People*, 2 Keyes, 684; 4 Abb. Dec. 509; *People v. Waltz*, 50 How. Pr. 204; 3 Abb. N. C. 209; *People v. Kleine*, 1 Edm. Sel. Cas. 13; *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207; *People v. Moett*, 23 Hun, 60; *People v. Sprague*, 2 Park. 43.

See, also, *State v. Murray*, 11 Ore. 418; *People v. Hoin*, 62 Cal. 120; 45 Am. Rep. 651; *State v. Lewis*, 12 Crim. Law Mag. 72, 85; *United States v. Young*, 7 id. 732; *State v. Bundy*, 24 S. C. 439; 58 Am. Rep. 262; *Cunningham v. State*, 56 Miss. 269; 31 Am. Rep. 360; *State v. Mowry*, 37 Kan. 369; *State v. Potts*, 100 N. C. 457; *United States v. Faulkner*, 35 Fed. Rep. 730; *Kearney v. People*, 11 Colo. 258.

A person must not only know that an act is unlawful and morally wrong, but he must have reason sufficient to apply such knowledge and be controlled by it. *McFarland's Trial*, 3 Abb. Pr. (N. S.) 57.

Influence of spirits is no defense where a knowledge of right and wrong exists. *People v. Waltz*, 50 How. 204.

Delirium tremens, like insanity, if it deprive one of the capacity of knowing right from wrong, saves him from any criminal responsibility from his acts. *People v. Carpenter*, 102 N. Y. 250; 4 N. Y. Cr. Rep. 187; *O'Connell v. People*, 87 N. Y. 877; 62 How. 436; *Erwin v. State*, 10 Tex. App. 700; *Guiteau's Case*, 3 Crim. Law Mag. 588; *Reg. v. Davis*, 14 Cox Cr. Cas. 563; 28 Eng. Rep. 657; *O'Brien v. People*, 48 Barb. 274.

See, also, *Real v. People*, 55 Barb. 551; 42 N. Y. 270; *Willis v. Com.* (Va.), 22 Alb. L. J. 176.

Where the court has charged the jury as to what constitutes insanity, it is not error to refuse to charge that if the jury find that defendant at the time the offense was committed was suffering from delirium tremens, or any other species of insanity, they must acquit. *People v. Mills*, 98 N. Y. 176.

A request to charge that if in consequence of some disease defendant had not sufficient use of his reason to control the passions which prompted the act, the jury must acquit, is erroneous as excluding the question of his capacity to distinguish between right and wrong. *People v. Mills*, 98 N. Y. 176.

One who, by reason of mental disease, has lost the power of will to control his actions and choose between right and wrong is not responsible to the criminal law for an act which is solely the product of such disease, although he may know right from wrong. *Parsons v. State*, 81 Ala. 577; 60 Am. Rep. 198; 86 Alb. L. J. 249.

The learned editor of the Albany Law Journal (86 Alb. L. J. 221) remarks on this case as follows: "The opinion by Judge Somerville is ingenious and learned, but it by no means satisfies us that the commonly received test of the ability to distinguish between right and wrong is unjust and not the safest rule to society, and it necessarily and explicitly overrules the doctrine of the same court in the *Boswell Case*, on the subject of insane delusions. See 63 Ala. 307; 85 Am. Rep. 20. It is possible that the doctrine now adopted in Alabama may have been previously adopted in New Hampshire, and perhaps in one or two other States, as we understand Judge Somerville to make claim, but it is certain that the vast preponderance of judicial opinion is the other way."

In an article on "Insanity and Criminal Responsibility" (12 Crim. Law Mag. 1) the writer says: "Common sense, reason and the weight of legal authority sustain the doctrine that if a person commits a crime, and at the time knows he is doing wrong, he should be held criminally responsible for his act. This is the only doctrine that will protect our social relations, uphold morality and religion. Speculative philosophy and phrenological interpretation of the state of the mind is no test as to one's insanity and are incompatible with the principles of rational psychology."

Burden of proof.—In *Brotherton v. People*, 75 N. Y. 159, Church, Ch. J., used the following language: "Crimes can only be committed by human beings who are in a condition to be responsible for their acts; and upon this general proposition, the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this, or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it; and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and, if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal."

See, also, 4 Crim. Law Mag. 512; 28 Eng. Rep. 661; 2 Lawson Crim. Def. 327; *O'Connell v. People*, 87 N. Y. 377; 41 Am. Rep. 379; *Walker v. People*, 88 N. Y. 81; *Casey v. People*, 81 Hun, 158; *People v. McCann*, 16 N. Y. 58; *Wagner v. People*, 2 Keyes, 684; 4 Abb. Dec. 509; *Cole's Case*, 7 Abb. Pr. (N. S.) 321; *People v. Schruyster*, 42 N. Y. 1; *Walters v. People*, 32 id. 147; *O'Brien v. People*, 48 Barb. 274; *People v. Robinson*, 1 Park. 649; *State v. Hoyt*, 46 Conn. 330; *State v. Lawrence*, 57 Me. 574; *State v. Jones*, 50 N. H. 369; *Dacey v. People*, 116 Ill. 555; *State v. Crawford*, 11 Kans. 32; *State v. Redeemier*, 1 Crim. Law Mag. 456.

A reasonable doubt of defendant's insanity raised by all the evidence does not justify an acquittal. *Parsons v. State*, 81 Ala. 577; 60 Am. Rep. 198.

Medical experts may be permitted to state in connection with their opinion as to the sanity or insanity of a person based upon the testimony in the case, the reason upon which it is founded. *People v. Barber*, 115 N. Y. 457.

But inferences from the facts which are within the range of ordinary judgment and experience are to be drawn by the jury and cannot be proved by the opinion of such witnesses. *People v. Barber*, 115 N. Y. 457.

Where the defense is insanity it is not competent to prove declarations made by defendant to his physician as to his conduct at a time prior to the declarations, nor are such declarations a proper basis of a scientific opinion of his mental condition at that time. *People v. Hawkins*, 109 N. Y. 408.

In *Kemmler's Case*, 119 N. Y. 580, physicians who had been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify as witnesses for the prosecution to his mental condition under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail.

As to what questions may be asked a non-expert witness, see 27 Eng. Rep. 426; *People v. Pakenham*, 115 N. Y. 200; *De Witt v. Bailey*, 17 id. 348; *Clapp v. Fullerton*, 34 id. 190; *O'Brien v. Peo.*, 36 id. 276; *Real v. Peo.*, 42 id. 282.

§ 22. Intoxicated persons.— No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

Voluntary intoxication furnishes no excuse for crime. *Flanigan v. People*, 86 N. Y. 554; 40 Am. Rep. 556; *People v. Cavanaugh*, 63 How. Pr. 187; *People v. Conroy*, 83 Hun, 119; 2 N. Y. Cr. Rep. 247; *Kenny v. People*, 31 N. Y. 330; 27 How. 202; 18 Abb. 91; *Lonergan v. People*, 6 Park. 209; 50 Barb. 266; *Freory v. People*, 54 id. 819; *People v. Porter*, 2 Park. 214; *People v. Fuller*, id. 16; *People v. Wiley*, id. 19; *Com. v. Hawkins*, 3 Gray, 468; *State v. Bundy*.

24 S. C. 439; 58 Am. Rep. 262; *Shanahan v. Com.*, 8 Bush, 463; 8 Am. Rep. 465; *Beck v. State*, 73 Ga. 452; *Upstone v. People*, 109 Ill. 169; *Hopt v. People*, 104 U. S. 631. See, also, 28 Eng. Rep. 659; 7 Am. St. Rep. 21.

Voluntary intoxication amounting to phrenzy, no defense where a homicide is committed without provocation. *Flanigan v. People*, 86 N. Y. 554; 40 Am. Rep. 556, n.; *People v. Rogers*, 18 N. Y. 9; reversing 3 Park. 632; *Kenny v. People*, 31 N. Y. 330; *People v. Robinson*, 1 Park. 649; 2 id. 235; *People v. Hammill*, id. 223; *People v. Batting*, 49 How. 392; *People v. Eastwood*, 3 Park. 25; 14 N. Y. 562; *State v. Harlow*, 21 Mo. 446; *Shanahan v. Com.*, 8 Bush, 463; *Rafferty v. People*, 66 Ill. 118; *Charci v. State*, 31 Ga. 424; *Humphreys v. State*, 45 id. 190.

Where intoxication results in a fixed mental disease of some continuance and duration, it will relieve from criminal responsibility. *Loneragan v. People*, 6 Park. 209; 50 Barb. 266; 34 How. 390; *O'Brien v. People*, 48 Barb. 274; *People v. Williams*, 43 Cal. 344; *U. S. v. Drew*, 5 Mason, 28; *State v. McGonigal*, 5 Harring. 510. See, also, 28 Eng. Rep. 661.

Permanent insanity produced by habitual drunkenness excuses acts otherwise criminal; but one who while sober deliberately resolves to kill another, and makes himself drunk for the purpose of nerving himself to the accomplishment of his design, and kills such person while he is so drunk as to be incapable of forming such design, and temporarily insane and unconscious of what he is doing, is still guilty of murder in the first degree. *State v. Robinson*, 20 W. Va. 718; 43 Am. Rep. 799.

Voluntary intoxication is no excuse for crime, but the proof of it may reduce the crime of murder to the second degree, by showing the absence of deliberation. *People v. Batting*, 49 How. 392; *State v. Trivas*, 32 La. Ann. 1086; 36 Am. Rep. 293.

In fixing the grade of crime of which the person is guilty, the evidence of his intoxication becomes very important, and is to be carefully weighed. *People v. Batting*, 49 How. 392.

Evidence of intoxication is always admissible to explain the conduct and intent of the prisoner. *People v. Hammill*, 2 Park. 223; *Loneragan v. People*, 6 Park. 209; 50 Barb. 266; *People v. Rogers*, 18 N. Y. 9; *Eastwood v. People*, 3 Park. 25; 14 N. Y. 562.

The jury may not infer an absence of premeditation from the fact that defendant was intoxicated when he committed the crime. *O'Brien v. People*, 48 Barb. 274.

A refusal to charge on a trial for murder that intoxication absolutely tends to show absence of premeditation and deliberation is not error. *People v. Mills*, 98 N. Y. 176; 21 W. Dig. 137; 3 N. Y. Cr. Rep. 187.

In *People v. Burns*, 83 Hun, 296; 2 N. Y. Cr. Rep. 415, it was held that it was not error to instruct the juror in a case of burglary that they might take into consideration the intoxication of defendant, in determining the intent with which he entered the building in question.

Defendant while intoxicated entered the sleeping-room of the complainant where she was in bed, removed the bed clothes from her person and got into the bed, but without touching her person, she leaving the bed at once. *Held*, sufficient evidence to sustain a verdict of assault although the defendant did

not in fact touch the complainant's person; that it was a question of fact for the jury to determine whether he was so far intoxicated at the time as to be unable to form a guilty intent. *Com. v. Hagenlock*, 140 Mass. 125; 2 East. Repr. 104.

One wrongfully taking the property of another, but too drunk to entertain a felonious intent, cannot be convicted of larceny. *Wood v. State*, 34 Ark. 341; 36 Am. Rep. 13.

On a trial for theft the accused offered to prove that at the time of the commission of the offense he was so drunk as to be incapable of forming an intent to steal. The offer was overruled. *Held*, error. *Loza v. State*, 1 Tex. Ct. App. 488; 83 Am. Rep. 416.

§ 23. **Morbid criminal propensity.**—A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.

In *People v. Carpenter*, 102 N. Y. 250, Ruger, Ch. J., said: "The only exception remaining which is deemed of sufficient importance to merit particular notice, is that taken to the refusal of the court to charge according to the request of the prisoner's counsel. 'If some controlling disease was in truth the acting power within him—the prisoner—which he could not resist, or if he had not a sufficient use of his reason to control the passion which prompted the act complained of, he is not responsible.' The principle of this request is not only impliedly condemned by sections 21 and 23 of the Penal Code, but has been held to be untenable by the express decision of this court. *Flanagan v. People*, 52 N. Y. 467. Judge Andrews there says: 'Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law.' The learned trial judge had laid down the rule governing the jury in considering such a defense in the language of the statute, which furnished a simple, clear and intelligible guide for their deliberations, and from a careful and painstaking examination of the evidence in the case, we see no reason to suppose that they have mistaken as to its character and effect, or the legal principles applicable thereto." See, also, *People v. Watts*, 50 How. Pr. 204; *Huntington's Trial*, 334 *et seq.*

§ 24. **Rule as to married woman.**—It is not a defense, to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband.

See 31 Am. Rep. 331; 16 Eng. Rep. 232; 13 id. 454; 1 Bish. Cr. Law (7th ed.), § 359.

Coverture is no protection to a wife who participates with her husband in the commission of a crime, where she takes an active and willing part in the

criminal act, and proof will overcome the *prima facie* evidence of coercion which the husband's presence would imply. *People v. Ryland*, 97 N. Y. 126; 28 Hun, 568.

Joint conviction of husband and wife will be sustained if no coercion be shown. *Goldstein v. People*, 83 N. Y. 231.

A wife will not be held responsible for a larceny committed by her, by coercion of her husband or in his company, which presumes coercion; but the coercion of his company is only presumptive, and if it appear that she was not urged to the offense by him, but was herself the inciter of it, she is equally responsible. *Seiler v. People*, 77 N. Y. 411.

Where there is a preconcert between husband and wife to commit a robbery, and she is present voluntarily aiding and abetting in the crime, she is responsible. *Goodman's Case*, 6 C. H. Rec. 21.

It has been held that a woman in the presence of her husband cannot be guilty of an assault and battery on one with whom her husband has a controversy. *Brown's Case*, 3 C. H. Rec. 56; *Rooney's Case*, id. 126.

It is otherwise, however, if the husband does not participate. *Boyd's Case*, 3 C. H. Rec. 134. See *Quinlan v. People*, 6 Park. 9; *People v. Townsend*, 3 Hill, 479; *Brandon's Case*, 4 C. H. Rec. 140.

§ 25. Rule as to persons acting under threats, etc.—

Where a crime is committed or participated in by two or more persons, and is committed, aided, or participated in by any one of them, only because, during the time of its commission, he is compelled to do, or to aid or participate in the act, by threats of another person engaged in the act or omission, and reasonable apprehension on his part of instant death or grievous bodily harm, in case he refuses, the threats and apprehension constitute duress, and excuse him.

§ 26. Rule when act done in defense of self or another.

—An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from inevitable and irreparable personal injury, and the injury could only be prevented by the act, nothing more being done than is necessary to prevent the injury.

See Code Crim. Proc., §§ 79, 80, 81; see, also, §§ 203, 204, 205 and 223, *post*.

One without fault, if attacked by another, may kill his assailant, if the circumstances be such as furnish reasonable ground of a design to take his life or do him great bodily harm, though in point of fact he is mistaken. *Shorter v. People*, 2 N. Y. 193; 4 Barb. 460; *Patterson v. People*, 46 Barb. 625.

See *People v. Lamb*, 54 id. 342; 2 Keyes, 360; 2 Abb. (N. S.) 148; *People v. Austin*, 1 Park. 154; *People v. Cole*, 4 id. 35; *Pfommer v. People*, id. 558; *Uhl v. People*, 5 id. 410; 4 Am. and Eng. Encyc. of Law, 691; 6 N. Y. Cr. Rep. 116, note; *People v. Lennon*, 71 Mich. 298; 15 Am. St. 259; *People v. Pearl*, 76 Mich. 207; 15 Am. St. 259.

In *State v. Broussard*, 30 La. Ann. 671, it was held that proof of the disparity between the size and strength of the prosecutor and the accused is inadmissible, unless there has been a *prima facie* case of self-defense laid by the defendant, or it has been preceded by proof that the accused was the attacking party. The court said: "The decisions are clear that a party, in order to introduce evidence as to the character or disparity in size and strength, must lay a proper foundation, and show that at the time the accused inflicted the wound as charged, he was attacked by the wounded party. On this question, Wharton says: 'In England we have no authority direct to this particular point. Intimations, however, from eminent judges, would lead us to believe that evidence would not be refused when there is a *prima facie* case of self-defense laid by the defendant.' Whart. Hom. 503, § 607. The same learned author says: 'The general principle, then, is this: Not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, for it is as much murder in such manner to kill the most desperate of men as to kill the most inoffensive, but that, whenever it is shown that a person *honestly believed* himself *attacked*, it is admissible for him to put in evidence whatever could show the *bona fides* of his belief.' Whart. Crim. Ev., § 69. These principles have been crystallized into our jurisprudence. *State v. Burns*, 30 La. Ann. 679; *State v. Vance*, 32 id. 1177; *State v. Jackson*, 33 id. 1087; *State v. Claude*, 35 id. 71; *State v. Watson*, 36 id. 148; *State v. Janvier*, 37 id. 644; *State v. Spell*, 38 id. 20."

The burden is on the prisoner to show that sufficient cause existed to justify him in using a deadly weapon. *Sawyer v. People*, 16 Week. Dig. 394.

One may not resist an officer who levies upon his property under an execution upon a justice's judgment against a third party when the officer acts in good faith. *Hall v. People*, 2 N. Y. Cr. Rep. 134; 18 Week. Dig. 357.

Where one believes himself about to be attacked, he must, if possible, avoid his assailant. *People v. Sullivan*, 7 N. Y. 396; *People v. Cole*, 4 Park. 85; *People v. McGrath*, 47 Hun, 325.

If a fatal blow be struck in self-defense, the homicide is not justified, unless the accused first retreated as far as he could. *People v. Harper*, Edm. Sel. Cas. 180; *Shorter v. People*, 2 N. Y. 193; 4 Barb. 460.

One who is opposing a felony may lawfully use all necessary force, even to the killing of the felon. *Ruloff v. People*, 45 N. Y. 213; 5 Lans. 261; 11 Abb. (N. S.) 245; *People v. Hand*, 4 Alb. L. J. 91.

A party assailed may seek the protection of the authorities, but his failure so to do does not deprive him of the right to defend himself in the same manner and to the same extent and by the same means as if he had done so. *Evers v. People*, 3 Hun, 716; 63 N. Y. 625.

To what extent and in what way force may be used in defense of personal property. *Gyre v. Culver*, 47 Barb. 592; *Morgan v. Durfee*, 21 Alb. L. J. 215.

To what extent and in what way force may be used in defending one's freehold. *Corey v. People*, 45 Barb. 262; *Wood v. Phillips*, 45 N. Y. 152; *People v. Gulick*, Lator, 129; *Harrington v. People*, 6 Barb. 607.

If one is attacked with a dangerous weapon it is incumbent upon him to avoid the assault by retreat if retreat is open to him, but if this prove unavailing, the law will hold him harmless if in defending himself he kills his assailant. *People v. Minisci*, 12 State Rep'r, 720.

§ 27. **Exemption of public ministers.**— Ambassadors and other public ministers from foreign governments, accredited to the president or government of the United States, and recognized according to the laws of the United States, with their secretaries, messengers, families and servants, are not liable to punishment in this state, but are to be returned to their own country for trial and punishment.

See Federal Const., art. III, § 2; 1 Bish. Cr. Law, § 585; Wheaton's International Law, 264, § 6; Id. 271, § 14.

TITLE II.

OF PARTIES TO CRIMES.

SECTION 28. Principal and accessory.

29. Definition of principal.

30. Definition of accessory.

31. All principals in misdemeanors.

32. Trial of accessories.

33. Punishment of accessories.

§ 28. **Principal and accessory.**— A party to a crime is, either

1. A principal; or,
2. An accessory.

§ 29. **Definition of principal.**— A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

In *People v. Bliven*, 112 N. Y. 82, Peckham, J., says: The purpose and effect of the section are to abolish the distinction which heretofore existed in cases of felony, between a principal and an accessory before the fact; the principal being present and either committing the act himself or aiding in its commission, and the accessory before the fact being absent, but counseling and procuring its commission, * * * to place a person who in cases of felony would otherwise have been guilty as an accessory before the fact under the same as had heretofore obtained in cases of treason and misdemeanor."

See, also, *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667; *People v. Batterson*, 50 Hun, 44; *People v. Ryland*, 97 N. Y. 126; *People v. Basford*, 8 N. Y. Cr. Rep. 228; 21 Week. Dig. 349; *People v. Fitzgerald*, 5 N. Y. Cr. Rep. 343; *Carrington v. People*, 6 Park. 336; *People v. Katz*, 23 How. Pr. 94; *Wixson v. People*, 5 Park. 120; *United States v. Hughes*, 34 Fed. Rep. 732; *State v. Kirk*, 11 Ore. 505; *People v. Brien*, 53 Hun, 496; *People v. Katz*, 23 How. Pr. 93; *People v. Hall*, 57 id. 342; *People v. Kief*, 126 N. Y. 661, affirming 58 Hun, 344; *People v. Phelps*, 61 id. 117.

"The presence of a principal in a felony may be constructive, and that constructive presence is made out when it is shown that he acted with another in the pursuance of a common design; that he acted at one and the same time for the fulfillment of the same preconcerted end, and was so situated as to be able to give aid to his associate, with a view to insure the success of the common enterprise. A waiting and a watching at a convenient distance is enough." *McCartney v. People*, 83 N. Y. 418; *People v. Sanborn*, 14 State Rep. 126; 40 Hun, 682; *People v. McElroy*, 86 State Rep. 650.

This section has not changed the form of pleading in the cases where a person was principal at common law or under the statute. *People v. Batterson*, 50 Hun, 44.

§ 30. Definition of accessory.—A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory to the felony.

To constitute an accessory one must not alone assist the principal to escape punishment but must help him to elude or evade capture. *People v. Dunn*, 7 N. Y. Cr. Rep. 173.

Receipt of property, knowing it to have been stolen, does not render one an accessory to the larceny. *Id.*

§ 31. All principals in misdemeanors.—A person who commits or participates in an act which would make him an accessory if the crime committed were a felony, is a principal, and may be indicted and punished as such, if the crime be a misdemeanor.

See § 682, *post*.

All those who aid or abet in the commission of a misdemeanor are principal offenders. Leasing a house for the purposes of prostitution, *Erwin v. People*, 4 Den. 129; petit larceny, *Lowenstein v. People*, 54 Barb. 299; *Ward v. People*, 3 Hill, 395; 6 id. 114; *post*, § 535; keeping shop open on Sunday, *Com. v. Dale*, 144 Mass. 363; conspiracy, *People v. Mathews*, 4 Wend. 229.

§ 32. Trial of accessories.—An accessory to a felony may be indicted, tried, and convicted, either in the county where he

became an accessory, or in the county where the principal felony was committed, and whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction.

See § 126, *post*; *People v. Gray*, 25 Wend. 464, and *Jones v. People*, 20 Hun, 545; *People v. Basford*, 3 N. Y. Cr. Rep. 219; *Starin v. People*, 45 N. Y. 833.

What sufficient evidence to go to the jury that accused was a principal and not merely an accessory. *People v. Ryland*, 97 N. Y. 126.

§ 33. Punishment of accessories.— Except in a case where a different punishment is specially prescribed by law, a person convicted as an accessory to a felony is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both

TITLE III.

DEGREES IN THE COMMISSION OF CRIMES AND ATTEMPTS TO COMMIT CRIMES.

SECTION 34. What is an attempt to commit a crime.

35. Prisoner indicted may be convicted of lesser crime or attempt.

36. Acquittal or conviction bars indictment for another degree; attempt.

§ 34. What is an attempt to commit a crime.— An act, done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime.

See §§ 174, 685, *post*; 1 Am. and Eng. Encyc. of Law, 936; 37 Eng. Rep. 442; 11 id. 372; 4 Crim. Law Mag. 12; 1 Bish. Cr. Law, § 657; Whart. Cr. Law (8th ed.), § 979; *Darrow v. Family Fund Society*, 42 Hun, 245; affirmed, 116 N. Y. 542; *Mulligan v. People*, 5 Park. 105; *People v. Johnson*, 46 Hun, 670; *United States v. Stephens*, 8 Sawy. 116; 3 Crim. Law Mag. 536; *People v. Stiles*, 75 Cal. 570; *State v. Gray*, 19 Nev. 212; *Cox v. People*, 82 Ill. 191.

In *Lamb v. State*, 67 Md. 524, the court said: "The law would not be a practical system if it did not define with precision the nature and circumstances of the attempts which are criminal and determine what acts are necessary to make the attempt a substantive offense."

"The criminal intent is but one element in an attempt, there must also be an act tending to effect the commission of the defined crime. If the act merely

tends to show guilty purpose but does not tend to effect the commission of the particular crime there is no attempt in a legal sense. We must not go astray by following dictionary definitions of the word 'attempt' rather than 'legal.' " *People v. Moran*, 7 N. Y. Cr. Rep. 836; 54 Hun, 279. This case was reversed. 123 N. Y. 254; 42 Alb. L. J. 495; 83 State Rep. 398.

In *People v. Bush*, 4 Hill, 183, the defendant solicited another to commit arson, and furnished him with a match for the purpose, but the crime was not committed; *held*, that the prisoner was guilty of an attempt to commit a crime.

This case was followed in *McDermott v. People*, 5 Park. 102.

Defendant, having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterward was arrested; *held*, that his failure to return was not proof that he had abandoned his purpose. Anywhere between the conception of the intent and the overt act toward its commission there is room for penitence, and the law in its beneficence extends the hand of forgiveness. But when the evil intent is supplemented by the requisite act toward its commission, the offense is complete. *State v. Hayes*, 78 Mo. 307.

In *Hicks v. Com.*, 18 Va. L. J. 525, the court said: "An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct ineffectual act done toward its commission. Code, § 3888; 2 Bish. Crim. Proc., § 71. Or, as Wharton defines it, 'an attempt is an intended apparent unfinished crime.' Therefore, the act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense, after the preparations are made. *Uhl's Case*, 6 Gratt. 706; *McDade v. People*, 29 Mich. 50; Bouv. Law Dic., 'Attempt.'

"Thus it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either case is considered only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. 'To make the act an indictable attempt,' says Wharton, 'it must be a cause distinguished from a condition. And it must go so far that it would result in the crime unless frustrated by extraneous circumstances.' 1 Whart. Crim. Law, § 181."

In *People v. Murray*, 14 Cal. 159, the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted. But on appeal the judgment was reversed, the appellate court holding that these were mere preparations, and did not constitute an attempt, within the meaning of the statute. Field, Ch. J., said: "The evidence shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The

preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: A party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with an attempt to kill. So in the present case, the declarations, and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness (*i. e.*, in a legal sense) that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party."

In *Stabler v. Com.*, 95 Penn. St. 318; 40 Am. Rep. 658; 11 Cent. L. J. 404; 22 Alb. L. J. 448, the defendant was indicted and convicted for an attempt to administer poison. It was proved at the trial that the defendant, in a conversation with the witness, Neyer, stated his grievance against his intended victim, W., and his determination to be revenged, and then solicited Neyer to put poison in W.'s spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered. But the witness refused to have any thing to do with it, and handed it back to the defendant, and testified that he never intended to administer it. Upon these facts the supreme court held that all that occurred at the interview with the witness and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the felony charged; that the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it, within the meaning of the statute, and the judgment was accordingly reversed. "Merely soliciting one to do an act," said the court, "is not an attempt to do that act. * * * In a high moral sense it may be true that solicitation is an attempt, but in a legal sense it is not."

Sending a letter which solicits and entices the commission of a crime will, if such letter is intercepted and never reaches the person to whom it was addressed, render the sender liable for an attempt to solicit and incite. *Regina v. Banks*, 12 Cox Cr. Cas. 898; 5 Eng. Rep. 471.

A mere solicitation to commit a misdemeanor, which if not in fact committed, is not of itself a misdemeanor. *Lamb v. State*, 67 Md. 524; *Whitesides v. State*, 11 Lea (Tenn.), 474.

Mere threats without proceeding to some act are not punishable by indictment. *Marrette's Case*, 3 City Hall Rec. 60.

In *People v. Moran*, 123 N. Y. 254, reversing 54 Hun, 279, defendant was indicted for an attempt to commit grand larceny by picking pockets. The evidence showed that the accused attempted to pick the pocket of a lady in New York city, but there was no proof that there was property in the pocket

Held, that to sustain a conviction, the prosecution was not bound to prove that there was property in the pocket.

In *Reg. v. Brown*, 24 Q. B. Div. 357, the conviction was of an attempt to commit an unnatural offense with domestic fowls, including, we infer, a duck, and the point was raised, that as the offense was impossible of commission, there could be no "attempt" to commit it. In other words, that there can be no attempt to do the impossible. The court unanimously denied that reasoning, disapproving *Reg. v. Collins* and *Reg. v. Dodd*, in which it was held that where one put his hand into another person's empty pocket he could not be convicted of an attempt to steal. This accords with *Com. v. McDonald*, 5 Cush. 365, and *People v. Jones*, 46 Mich. 441. *Rogers v. Com.*, 5 S. & R. 462; *State v. Wilson*, 30 Conn. 500; *Kunkle v. State*, 32 Ind. 520; *Hamilton v. State*, 36 id. 280; *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490, hold the like doctrine in respect to acts *with intent* to do a particular thing. See 41 Alb. L. J. 425.

Punishment of attempts. See §§ 686-687, *post*.

§ 35. Prisoner indicted may be convicted of lesser crime or attempt.—Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.

See *ante*, § 10; *post*, § 685; 2 Edm. Stat. 725, § 27; Code Crim. Proc. §§ 444, 445; 12 Alb. L. J. 387; 7 Crim. Law Mag. 157; *People v. McCallam*, 3 N. Y. Cr. Rep. 199; *People v. Sullivan*, 4 id. 197; *People v. Palmer*, 5 id. 105; 8 State Rep. 500; 43 Hun, 406; *Murphy v. People*, 3 Hun, 114.

When there is a reasonable doubt of which degree defendant is guilty, jury must convict of lowest. Code Crim. Proc., § 390.

On an indictment for assault in the first degree, by shooting, where defendant admits the shooting, but pleads self-defense, there must be an acquittal, or a verdict of guilty, either in the first or second degree, as the evidence may show; and defendant is not entitled to an instruction, that the jury may find an assault in the first, second, or third degree, or an attempt to assault in any of those degrees, as provided by this section, as the plea of self-defense admits the higher grade of crime. *People v. Dartmore*, 48 Hun, 321; 2 N. Y. Supp. 310.

On a trial for grand larceny, first degree, may convict of grand larceny, second degree. *People v. McCallam*, 3 N. Y. Cr. Rep. 199.

Or of petit larceny. *People v. McTameney*, 30 Hun, 505; 1 N. Y. Cr. Rep. 437; 66 How. Pr. 70; 12 Abb. N. C. 55.

Where a defendant is convicted of a misdemeanor, and that offense is sufficiently charged in the indictment, the conviction will be sustained, if otherwise valid, notwithstanding there is an allegation in the indictment of facts characterizing a higher crime. *People v. Lohman*, 2 Barb. 216.

In *Keefe v. People*, 40 N. Y. 348; 7 Abb. (N. S.) 76, the prisoner upon an indictment in the common-law form containing a single count, for murder by stabbing with a knife, was convicted of murder in the second degree, "above

charged in the form aforesaid, as by the indictment aforesaid is alleged. *Held*, proper. See, also, *Cox v. People*, 80 N. Y. 514.

Indictment for murder in first degree, in common-law form, permits a conviction of manslaughter in first degree upon a plea of guilty to last-named offense. *People v. McDonnell*, 1 N. Y. Cr. Rep. 366; 92 N. Y. 657, mem.

On an indictment for arson in the first degree, there may be a conviction for attempting to commit arson in any of the lesser degrees. *People v. Long*, 2 Edm. Sel. Cas. 129; *People v. Didien*, 17 How. Pr. 224.

Under an indictment for burglary defendant may be convicted of an attempt to commit the burglary charged. *People v. Lavton*, 56 Barb. 126.

Indictment need not allege facts or circumstances, which, if proven, would constitute the lesser crime. These are matters of evidence for the benefit of the accused. *People v. McDonnell*, 1 N. Y. Cr. Rep. 366; 92 N. Y. 657, mem.

Indictment in common-law form sufficient, notwithstanding the statute, and permits a conviction for the offense charged in any degree, corresponding to the evidence. *People v. McDonnell*, 92 N. Y. 657; 1 N. Y. Cr. Rep. 366; *People v. Thompson*, 41 N. Y. 1; *Ruloff v. People*, 11 Abb. (N. S.) 245; 45 N. Y. 218; *Nevins v. People*, 61 Barb. 307.

The jury should first consider and determine whether the defendant is guilty of the crime charged, and if not so found, to consider lesser degrees. *People v. Willson*, 109 N. Y. 347.

Insanity cannot change the crime of murder from one degree to another. *Sindram v. People*, 88 N. Y. 196; affirmed, 1 N. Y. Cr. Rep. 143.

On a trial for murder in the first degree the judge charged: "If the prisoner at the bar is to be found guilty of murder in the second degree, or of any less offense, it is because you find that there is a reasonable doubt that he committed this act from a deliberate and premeditated design," etc. *Held*, not error as throwing the *onus* of raising the doubt on defendant, the court having previously charged that to find defendant guilty of murder in the first degree, they must be satisfied, beyond a reasonable doubt, that he committed the act of taking life with a deliberate and premeditated design, etc. *People v. Petmechy*, 2 N. Y. Cr. Rep. 452.

§ 36. Acquittal or conviction bars indictment for another degree; attempt. — Where a prisoner is acquitted or convicted, upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime so charged, or any degree thereof.

See State Const., art. 1, § 6; 2 Edm. Stat. 701, § 24; id. 725, § 25; Code Crim. Proc., §§ 9, 340, 341; 11 Am. and Eng. Encyc. of Law, 939; *People v. McCarthy*, 110 N. Y. 815.

An indictment contained three counts charging defendant with assault. A demurrer to the indictment having been overruled, defendant entered a plea of not guilty. Upon the trial he was convicted of assault in a lower degree than that charged, whereupon he moved for a new trial on the minutes of the court, also in arrest of judgment. Upon a denial of these motions and sentence, an

appeal was taken from the conviction for judgment. *Held*, that the defendant might be tried again under the indictment as though he had never been tried (*People v. Palmer*, 109 N. Y. 419), the court saying that the above section had reference only to cases where the prior judgment of conviction remains unreversed. See *People v. Cignarale*, 110 N. Y. 23, 83.

The arresting of judgment after conviction on an indictment for a felony is not a bar to a second indictment for the same offense. *People v. Casborus*, 13 Johns. 351.

A verdict of guilty of embezzlement is equivalent to an acquittal of a larceny charged in the same indictment, and a bar to subsequent prosecution for larceny. *Guenther v. People*, 24 N. Y. 100.

An acquittal on an indictment for a felony does not bar an indictment for a misdemeanor, or *vice versa*; and does not come within the statute referring to former acquittal or conviction. *People v. Saunders*, 4 Park. 196. See, also, *People v. Dowling*, 84 N. Y. 478; *Regina v. Gilmore*, 15 Cox Cr. Cas. 55; 36 Eng. Rep. 500.

A person indicted for murder in the first degree was convicted of murder in the second degree and obtained a new trial. *Held*, that on the second trial he could not be tried for or convicted of a higher crime than murder in the second degree. *Johnson v. State*, 29 Ark. 31; 21 Am. Rep. 154.

TITLE IV.

TREASON.

SECTION 37. Treason against the state defined.

38. Treason against the state, how punished.

39. Levying war defined.

40. Resistance to a statute when levying war.

§ 37. Treason against the state defined.—Treason against the people of the state consists in

1. Levying war against the people of the state, within this state; or

2. A combination of two or more persons by force to usurp the government of the state, or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or

3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed in the constitution of the United States, or giving to such enemies aid and comfort within the state or elsewhere.

See 2 Edm. Stat. 676, § 1; 2 Broom & Hadley Com. (Wait's ed.) 384.

The offense of adhering and giving aid and comfort to the enemies of the United States is not treason against the state, nor cognizable in the state courts. *People v. Lynch*, 11 Johns. 549.

A warrant for treason must set forth specially the treasonable acts charged. 1 Chi. L. N. 401.

Entering service of enemies. *Resp v. McCarthy*, 2 Dall. 86; *Roberts' Case*, 1 id. 89. Resisting an act of congress. *U. S. v. Hannay*, 2 Wall. Jr. 39.

Delivering up prisoners and deserters to the enemy is adhering to them and giving them aid and comfort, and is treason. *U. S. v. Hodges*, 1 Wheel. Cr. Cas. 477.

§ 38. Treason against the state, how punished.— Treason is punishable by death

See 2 Edm. Stat. 676, § 1; Federal Const., art. III, § 3; N. Y. State Const., art. IV, § 5; Code Crim. Proc., §§ 396, 397, 814, 816.

§ 39. Levying war defined.—

To constitute levying war against the people of this state, an actual act of war must be committed. To conspire to levy war is not enough.

"Levying war" is a technical term borrowed from the English law, and its meaning is the same as is used in Stat. 25 Edw. III. Bouv. Dict.

To constitute the offense there must be a combination of numbers, accompanied, of course, by a use of force. *United States v. Greathouse*, 4 Sawy. 465; 2 Abb. 864; *Ex parte Bollman*, 4 Cranch, 75; and *Burr's Trial* (Coombs' ed.) 812. See 1 Bish. Cr. Law, § 1229; and *U. S. v. Hoxie*, 1 Paine, 265.

§ 40. Resistance to a statute when levying war.—

Where persons rise in insurrection with intent to prevent in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they are guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war.

See cases cited under last section; *U. S. v. Hannay*, 2 Wall. Jr. 139, 208; *U. S. v. Mitchell*, 2 Dall. 348.

TITLE V.*

OF CRIMES AGAINST THE ELECTIVE FRANCHISE.

- SECTION 41.** Misdemeanors at political caucuses and conventions.
- 41a. False registration.
 - 41b. Mutilation, destruction or loss of registry list.
 - 41c. Misconduct of registry officers.
 - 41d. Failure of house-dweller to answer inquiries.
 - 41e. Removal, mutilation or destruction of election supplies, poll-lists or cards of instruction.
 - 41f. Refusal to permit employes to attend election.
 - 41g. Misconduct in relation to certificates of nomination and official ballots.
 - 41h. Failure to deliver official ballots.
 - 41i. Misconduct of election officers and watchers.
 - 41j. Violation of election law by public officer.
 - 41k. Misdemeanors in relation to elections.
 - 41l. Voting after conviction of infamous crime.
 - 41m. Voting by inhabitant of another state or country.
 - 41n. False returns.
 - 41o. Furnishing money or entertainment to induce attendance at polls.
 - 41p. Giving considerations for franchise.
 - 41q. Receiving consideration for franchise.
 - 41r. Testimony upon prosecution.
 - 41s. Bribery or intimidation of elector in military service of United States.
 - 41t. Duress and intimidation of voters.
 - 41u. Political assessments.
 - 41v. Corrupt use of position or authority.
 - 41w. Failure to file candidate's statement of expenses.
 - 41x. Procuring fraudulent certificates in order to vote.
 - 41y. Presenting fraudulent certificates to registry boards to procure registration.

§ 41. Misdemeanors at political caucuses and conventions.—Any person who,

1. Votes or attempts to vote at a political caucus or convention without being entitled to do so ; or
2. By bribery, menace or other corrupt means, directly or indirectly, attempts to influence the vote of any person entitled to vote at such caucus or convention, or obstructs such person in voting, or prevents him from voting thereat ; or
3. Fraudulently and wrongfully does any act tending to affect the result of an election at such caucus or convention ; or
4. Being an officer, teller or canvasser thereof, willfully omits, refuses or neglects to do any act required by the election law, or

* As amended by Laws 1892, chap. 693.

refuses to permit any person to do any act authorized thereby, or makes or attempts to make any false canvass of the ballots cast at such caucus or convention, or statement of the result of a canvass of the ballots cast thereat; or

5. Induces or attempts to induce any officer, teller or canvasser of such caucus or convention to do any act in violation of his duty ;
Is guilty of a misdemeanor.

§ 41a. **False registration.**—Any person who causes his name to be placed upon any list or register of voters in more than one election district for the same election, or upon a list or register of voters, knowing that he will not be a qualified voter in the district at the election for which such list or register is made, or aids or abets any such act, is punishable by imprisonment for not more than five years.

§ 41b. **Mutilation, destruction or loss of registry list.**—Any person who willfully loses, destroys or mutilates the list or register of voters in any election district, or a certified copy thereof, after the making of the same and before the closing of the polls of the election for which the same is made, is guilty of a misdemeanor.

§ 41c. **Misconduct of registry officers.**—Any member or clerk of a registry board who willfully violates any provision of the election law relative to the registration of electors, or willfully neglects or refuses to perform any duty imposed on him by law, or is guilty of any fraud in the execution of the duties of his office, shall be punishable by imprisonment for not less than two nor more than ten years.

In effect, as amended, Oct. 1, 1893: Laws 1893, ch. 692.

§ 41d. **Failure of house-dweller to answer inquiries.**—Any person dwelling in a building in a city who willfully refuses to truly answer any question asked by any elector of such city, between the first meeting of the boards of registry therein for any election and the closing of the polls of such election, relating to the residence and qualifications as a voter of any person dwelling in such building, or of any person who appears upon the list or register of voters made by a board of registry as residing at such building, is guilty of a misdemeanor.

§ 41e. **Removal, mutilation or destruction of election supplies, poll-lists or cards of instruction.**—Any person who

1. During an election or town meeting, willfully removes or destroys any of the supplies or other conveniences placed in the voting booths or compartments in pursuance of law ; or

2. Before the closing of the polls, willfully defaces or destroys any list of candidates to be voted for at such election or town meeting posted in accordance with the election law ; or

3. During an election or town meeting, willfully removes or defaces the cards, for the instruction of voters, posted in accordance with the election law, is guilty of a misdemeanor.

§ 41f. Refusal to permit employes to attend election.

—A person or corporation who refuses to an employe entitled to vote at an election or town meeting, the privilege of attending thereat, as provided by the election law, or subjects such employe to a penalty or reduction of wages because of the exercise of such privilege, is guilty of a misdemeanor.

§ 41g. Misconduct in relation to certificates of nomination and official ballots.—A person who,

1. Falsely makes or makes oath to, or fraudulently defaces or destroys, a certificate of nomination or any part thereof ; or

2. Files or receives for filing a certificate of nomination knowing that any part thereof was falsely made ; or

3. Suppresses a certificate of nomination which has been duly filed, or any part thereof ; or

4. Forges or falsely makes the official indorsement of any ballot ; or

5. Having charge of official ballots, destroys, conceals or suppresses them, except as provided by law,

Is punishable by imprisonment for not less than one nor more than five years.

§ 41h. Failure to deliver official ballots.—Any person who has undertaken to deliver official ballots to any city, town or village clerk, or inspector, as authorized by the election law, and neglects or refuses to do so, is guilty of a misdemeanor.

§ 41i. Misconduct of election officers and watchers.

—Any election officer or watcher who,

1. Reveals to another person the name of any candidate for whom a voter has voted ; or

2. Communicates to another person his opinion, belief or impression as to how or for whom a voter has voted ; or

3. Places a mark upon a ballot or does any other act by which one ballot can be distinguished from another, is punishable by imprisonment for not less than six months, nor more than one year.

§ 41j. **Violation of election law by public officer.**— A public officer who omits, refuses or neglects to perform any act required of him by the election law, or refuses to permit the doing of any act authorized thereby, is, if not otherwise provided by law, punishable by imprisonment for not more than three years, or by a fine of not more than three thousand dollars, or both.

§ 41k. **Misdemeanors in relation to elections.**— Any person who,

1. Acts as an inspector of election, poll clerk or ballot clerk, without being able to read and write the English language, or without being otherwise qualified to hold such office; or

2. Being an inspector of election, knowingly and willfully permits or suffers any person to vote who is not entitled to vote thereat; or

3. Willfully and lawfully obstructs, hinders or delays, or aids or assists in obstructing or delaying any elector on his way to a polling place, or while he is attempting to vote; or

4. Electioneers on election day within a polling place, or in a public street or room, or in any public manner, within one hundred and fifty feet of a polling-place; or

5. Knowingly votes or offers to vote at any election, when not qualified therefor; or

6. Procures, aids, assists, counsels or advises any person to go or come into any town, ward, or election district, for the purpose of voting at an election, knowing that such person is not qualified; or

7. Votes or offers to vote at an election more than once, in an election district or place where he does not reside; or

8. Procures, aids, assists, commands or advises another to vote or offer to vote at an election, knowing that such person is not qualified to vote thereat; or

9. Removes any official ballot from a polling-place before the closing of the polls; or

10. Shows his ballot after it is prepared for voting to any person, so as to reveal the contents, or solicits a voter to show the same; or

11. Places any mark upon his ballot, or does any other act in connection with his ballot, with the intent that it may be identified as the one voted by him; or

12. Places any mark upon, or does any other act in connection with a ballot or paster ballot, with the intent that it may afterwards be identified as having been voted by any particular person; or

13. Receives an official ballot from any person other than one of the ballot clerks having charge of the ballots; or

14. Not being a ballot clerk, delivers an official ballot to a voter; or

15. Not being an inspector of election, receives from any voter a ballot prepared for voting; or

16. Fails to return to the ballot clerks, before leaving the polling place or going outside the guard rail, each ballot not voted by him; or

17. Willfully disobeys any lawful command of the board of inspectors, is guilty of a misdemeanor. This section shall apply to general and special elections and town meetings, but nothing therein shall prevent any person from receiving or delivering an unofficial sample ballot, or from receiving, delivering and voting an unofficial ballot as authorized by the election law.

18. Willfully makes a false declaration of his right to vote at a neighborhood or school district meeting, after his right to vote thereat is challenged, is guilty of a misdemeanor.

Subd. 18, added Laws 1893, ch. 692, takes effect Oct. 1, 1893.

§ 41l. Voting after conviction of infamous crime.—

Any person who has been convicted of an infamous crime and has been sentenced or committed therefor to a state prison or penitentiary, who votes at any election unless he shall have been pardoned and restored to all the rights of a citizen, is guilty of a misdemeanor.

§ 41m. Voting by an inhabitant of another state or country.— Any inhabitant of another state or country who votes or offers to vote at an election or town meeting in this state, is guilty of a felony.

41n. False returns.— An inspector or poll clerk of an election or town meeting, who intentionally makes, or attempts to make, a false canvass of the ballots cast thereat, or any false statement of the result of a canvass, though not signed by a majority of the inspectors, or any person who induces or attempts to induce any such inspector or clerk so to do, is guilty of a felony.

§ 41o. Furnishing money or entertainment to induce attendance at polls. — Any person who, with the intent to promote the election of a person to an elective office :

1. Furnishes entertainment to the electors before or during an election or town meeting at which such person is a candidate ; or

2. Pays for, procures, or engages to pay for such entertainment ; or

3. Furnishes money or other property, or engages to compensate any person for procuring the attendance of voters at the polls of such election or town meeting ; or

4. Contributes money for any other purpose than the printing and circulating of hand bills, books and other papers previous to an election or town meeting, or conveying such poor or infirm electors to the polls, is guilty of a misdemeanor.

§ 41p. Giving considerations for franchise.— Any person who, directly or indirectly, by himself or through any other person :

1. Pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration to or for any voter, or to or for any other person, to induce such voter to vote or refrain from voting at such election for any particular person or persons, or to induce such voter to come to the polls or remain away from the polls at such election or on account of such voter having voted or refrained from voting, or having voted or refrained from voting for any particular person, or having come to the polls or remained away from the polls at such election ; or

2. Gives, offers or promises any office, place or employment, or promises to procure, or endeavors to procure any office, place or employment to or for any voter or to or for any other person, in order to induce such voter to vote or refrain from voting at such election for any particular person or persons ; or

3. Makes any gift, loan, promise, offer, procurement or agreement, as aforesaid, to, for or with any person in order to induce such person to procure or endeavor to procure the election of any person, or the vote of any voter at any election ; or

4. Procures or engages, or promises or endeavors to procure, in consequence of any such gift, loan, offer, promise, procure

ment or agreement, the election of any person or the vote of any voter at such election ; or

5. Advances, pays, or causes to be paid, any money or other valuable thing to or for the use of any other person with the intent that the same, or any part thereof, shall be used in bribery at any election, or knowingly pays, or causes to be paid any money or other valuable thing to any person in discharge or repayment of any money wholly or partly expended in bribery at any election,

Is guilty of an infamous crime, punishment by imprisonment for not less three months, nor more than one year, and in addition, forfeits any office to which he may have been elected at the election with reference to which such offense was committed.

§ 41q. **Receiving consideration for franchise.**— Any person who, directly or indirectly, by himself or through any other person :

1. Receives, agrees, or contracts for, before or during an election, any money, gift, loan, or other valuable consideration, office, place or employment for himself or any other person, for voting or agreeing to vote, or for coming or agreeing to come to the polls, or for remaining away or agreeing to remain away from the polls, or for refraining or agreeing to refrain from voting, or for voting or agreeing to vote, or for refraining or agreeing to refrain from voting for any particular person or persons at any election ; or

2. Receives any money or other valuable thing during or after an election on account of himself or any other person having voted or refrained from voting at such election, or on account of himself or any other person having voted or refrained from voting for any particular person at such election, or on account of himself or any other person having come to the polls or remained away from the polls at such election, or on account of having induced any other person to vote or refrain from voting for any particular person or persons at such election,

Is guilty of an infamous crime, punishable by imprisonment for not less than three months nor more than one year, and in addition shall be excluded from the right of suffrage for five years after such conviction ; and the clerk of the county in which such person is convicted shall transmit a certified copy of the record of conviction to the clerk of each county of the state, within ten days

thereafter, which copy shall be filed in his office by each of such clerks.

§ 41r. Testimony upon prosecution.—A person offending against any provision of section forty-one-p or of section forty-one-q of this Code is a competent witness against another person so offending, and may be compelled to attend and testify on any trial, hearing or proceeding, or investigation in the same manner as any other person. The testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying. A person testifying shall not thereafter be liable to indictment, prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution.

See *Counselman v. Hitchcock*, 142 U. S. 547; 45 Alb. L. J. 231.

§ 41s. Bribery or intimidation of elector in military service of United States.—Any person who, directly or indirectly, by bribery, menace or other corrupt means, controls or attempts to control an elector of this state enlisted in the military service of the United States, in the exercise of his rights under the election law, or annoys, injures or punishes him for the manner in which he exercises such right, is guilty of a misdemeanor for which he may be tried at any future time when he may be found within this state; and upon conviction thereof shall thereafter be ineligible to any office therein.

§ 41t. Duress and intimidation of voters.—Any person or corporation, who, directly or indirectly,

1. Uses or threatens to use any force, violence or restraint, or inflicts or threatens to inflict, any injury, damage, harm or loss, or in any other manner practices intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting at any election, or to vote or refrain from voting for any particular person or persons at any election, or on account of such person having voted or refrained from voting at any election; or,

2. By abduction, duress, or any forcible or fraudulent device or contrivance whatever, impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter, or

compels, induces or prevails upon any voter to give or refrain from giving his vote for any particular person at any election; or,

3. Being an employer, pays his employes the salary or wages due, inclosed in "pay envelopes," upon which there is written or printed any political motto, device or argument containing threats, express or implied, intended or calculated to influence the political opinions or actions of such employes; or within ninety days of a general election, put or otherwise exhibits in the establishment or place where his employes are engaged in labor, any handbill or placard containing any threat, notice or information, that if any particular ticket or candidate is elected or defeated, work in his place or establishment will cease, in whole or in part, his establishment be closed up, or the wages of his employes reduced, or other threats, express or implied, intended or calculated to influence the political opinions or actions of his employes,

Is guilty of a misdemeanor, and if a corporation, in addition, forfeits its charter.

§ 41n. Political assessments.—Any person who,

1. Being an officer or employe of the state, or of a political subdivision thereof, directly or indirectly uses his authority or official influence to compel or induce any other officer or employe of the state or a political subdivision thereof, to pay or promise to pay any political assessments; or

2. Being an officer or employe of the state, or of a political subdivision thereof, directly or indirectly, gives, pays or hands over to any other such officer or employe any money or other valuable thing on account of or to be applied to the promotion of his election, appointment or retention in office, or makes any promise, or gives any subscription to such officer or employe to pay or contribute any money or other valuable thing for any such purpose or object; or

3. Being such an officer or employe and having charge or control of any building, office or room occupied for any purpose of the state or of a political subdivision thereof, consents that any person enter the same for the purpose of making, collecting, receiving or giving notice of any political assessment; or

4. Enters or remains in any such office, building or room, or sends or directs any letter or other writing thereto, for the purpose

of giving notice of demanding or collecting, or being therein, gives notice of, demands, collects or receives, any political assessment;

5. Prepares or makes out, or takes any part in preparing or making out, any political assessment, subscription or contribution, with the intent that the same shall be sent or presented to or collected of any such officer or employe; or

6. Sends or presents any political assessment, subscription, or contribution to, or requests its payment of, any such officer or employe,

Is guilty of a misdemeanor.

§ 41v. Corrupt use of position or authority.— Any person who,

1. While holding a public office, or being nominated or seeking a nomination or appointment therefor, corruptly uses or promises to use, directly or indirectly, any official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used in behalf of any candidate, officer or party or upon any other corrupt condition or consideration; or

2. Being a public officer or employe of the state or a political subdivision having, or claiming to have, any authority or influence affecting the nomination, public employment, confirmation, promotion, removal, or increase or decrease of salary of any public officer or employe, or promises or threatens to use, any such authority or influence, directly or indirectly to affect the vote or political action of any such public officer or employe, or on account of the vote or political action of such officer or employe; or

3. Makes, tenders or offers to procure, or cause any nomination or appointment for any public office or place, or accepts or requests any such nomination or appointment, upon the payment or contribution of any valuable consideration, or upon an understanding or promise thereof, or

4. Makes any gift, promise or contribution to any person, upon the condition or consideration of receiving an appointment or election to a public office or a position of public employment, or

for receiving or retaining any such office or position, or promotion privilege, increase of salary or compensation therein, or exemption from removal or discharge therefrom, is punishable by imprisonment for not more than two years or by a fine of not more than three thousand dollars or both.

§ 41w. Failure to file candidate's statement of expenses.—Every candidate who is voted for at any public election held within this state shall, within ten days after such election, file as hereinafter provided an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who received such moneys, the specific nature of each item, and the purpose for which it was expended or contributed. There shall be attached to such statement an affidavit subscribed and sworn to by such candidate, setting forth in substance that the statement thus made is in all respects true, and that the same is a full and detailed statement of all moneys so contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Candidates for offices to be filled by the electors of the entire state, or any division or district thereof greater than a county, shall file their statements in the office of secretary of state. The candidates for town, village and city offices, excepting in the city of New York, shall file their statements in the office of the town, village or city clerk, respectively, and in cities wherein there is no city clerk, with the clerk of the common council of the city wherein the election occurs. Candidates for all other offices, including all officers in the city and county of New York, shall file their statements in the office of the clerk of the county wherein the election occurs. Any candidate for office who refuses or neglects to file a statement as prescribed in this section shall be guilty of a misdemeanor, and shall also forfeit his office.

§ 41x. Procuring fraudulent certificates in order to vote.—Any person who knowingly and willfully procures from any court judge, clerk or other officer, a certificate of naturalization, which has been allowed, issued, signed or sealed in violation of the laws of the United States or of this state, with intent to enable himself or any other person to vote at any election when he or

such person is not entitled by the laws of the United States to become a citizen or to exercise the elective franchise, is guilty of a felony.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 41y. Presenting fraudulent certificates to registry boards to procure registration.—A person who knowingly and willfully presents to any board of officers, for the purpose of having himself or any other person placed upon any list or registry of voters, or to any board of officers for the purpose of enabling himself or any other person to vote at any election, any certificate of naturalization which has been allowed or issued by or procured from any judicial officer, clerk of a court, or other ministerial officer of a court, by any false statement, oath or representation, or in violation of the laws of the United States or of this state, with intent to enable any person to vote at any election, when such person is not entitled by the laws of the United States to become a citizen, or of this state, to exercise the elective franchise is guilty of a felony.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

TITLE VI.

OF CRIMES BY AND AGAINST THE EXECUTIVE POWER OF
THE STATE.

- § 42. Acting in a public office without having qualified.**
 43. Acts of officer *de facto*, not affected.
 44. Giving or offering bribes.
 45. Asking or receiving bribes.
 46. Attempting to prevent officers from performing duty
 47. Resisting officers.
 48. Taking unlawful fees.
 48a. Comptroller not to be interested in tax sales.
 48b. Prison officers not to be interested in prison contracts.
 48c. Appraisers taking fee or reward.
 49. Taking reward for omitting or delaying official acts.
 50. Taking fees for services not rendered.
 51. Taking unlawful reward for services in extradition of fugitives.
 52. Corrupt bargain for appointments, etc.
 53. Corrupt bargain for appointments, etc.
 54. Selling right to official powers.
 55. Such appointment avoided by conviction.
 56. Intrusion into public office.
 57. Offender refusing to surrender to successor.
 58. Administrative officers.

§ 42. Acting in a public office without having qualified.

—A person who executes any of the functions of a public office without having taken and duly filed the required oath of office, or without having executed and duly filed required security, is guilty of a misdemeanor, as prescribed by law.

In effect, as amended, Oct. 1, 1893; Laws 1893, ch. 692.

See *Weeks v. Ellis*, 2 Barb. 321; *People v. Collins*, 7 Johns. 549; *McKinstry v. Tanner*, 9 id. 135; *People v. Stevens*, 5 Hill, 617; *Foot v. Stiles*, 57 N. Y. 399.

§ 43. Acts of officer *de facto* not affected. — The last section must not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

See *People, ex rel. Sinkler, v. Terry*, 108 N. Y. 1.

Acts of *de facto* officer valid as regards the public. *Foot v. Stiles*, 57 N. Y. 399; *People v. Cook*, 14 Barb. 324; *Weeks v. Ellis*, 2 id. 324; *People v. Collins*, 7 Johns. 549; *McKinstry v. Tanner*, 9 id. 135; *People v. Stevens*, 5 Hill, 616.

An officer *de facto* is one who exercises the duties of an officer under color of right, as distinguished from a mere usurper. *Rochester & Gen. Val. R. R. v. Clark Nat. Bank*, 60 Barb. 234; *People v. Albertson*, 8 How. 363; *People v. Peabody*, 6 Abb. 228; *Conover v. Deolin*, 15 How. 470.

One who receives an appointment to office from a proper authority is an officer *de facto*, though his appointment is informal. *Hamlin v. Dingman*, 5 Lans. 61.

A constable is justified in executing a process regular on its face, although the officer issuing such process be but an officer *de facto*. *Wilcox v. Smith*, 5 Wend. 281; *Read v. Buffalo*, 8 Keyes, 445.

A person elected to an office, but who neglects to give security and take the oath of office, is, nevertheless, a *de facto* official. *Greenleaf v. Low*, 4 Den. 168.

§ 44. Giving or offering bribes. — A person who gives or offers a bribe to any executive officer of this state with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as such officer, is punishable by imprisonment in a state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or by both.

See 2 Edm. Stat. 703, § 9; 2 Laws 1867, p. 1793; 2 Bish. Cr. L. (7th ed.), § 25; *People v. Short*, 107 N. Y. 439; *State v. Ellis*, 33 N. J. L. 102.

§ 45. Asking or receiving bribes. — An executive officer, or person elected or appointed to an executive office, who asks, receives or agrees to receive any bribe, upon an agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or by both; and in addition thereto forfeits his office and is forever disqualified from holding any public office under this state.

See 2 Am. and Eng. Encyc. of Law, 530; 1 Bish. Cr. L. (6th ed.), § 464; *Walsh v. People*, 65 Ill. 58; 16 Am. Rep. 569; *People v. Markham*, 64 Cal. 147; 49 Am. Rep. 700.

§ 46. Attempting to prevent officers from performing duty. — A person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, is guilty of a misdemeanor.

See §§ 61, 62, 63 and 127, *post*; *People v. Palmer*, 5 N. Y. Cr. Rep. 110.

The owner of personal property is liable to indictment for using force to prevent an officer from levying upon such property, by virtue of an execution against another person, where the officer acts in good faith, believing the property to be that of the execution debtor. *People v. Hall*, 2 N. Y. Cr. Rep. 184.

§ 47. **Resisting officers.**— A person who knowingly resists, by the use of force or violence, any executive officer, in the performance of his duty, is guilty of a misdemeanor.

See § 124, *post*.

§ 48. **Taking unlawful fees.**— A public officer or a deputy, clerk, assistant or other subordinate of a public officer, or any person appointed or employed by or in the office of a public officer, who shall, in any manner, act for or in behalf of any such officer, who asks or receives, or consents or agrees to receive, any emolument, gratuity or reward, or any promise of emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, except such as may be authorized by law for doing or omitting to do any official act, or for performing or omitting to perform, or for having performed or omitted to perform any act whatsoever directly or indirectly related to any matter in respect to which any duty or discretion is by or in pursuance of law imposed upon or vested in him, or may be exercised by him by virtue of his office, or appointment or employment, or his actual relation to the matter, shall be guilty of a felony, punishable by imprisonment for not more than ten years or by a fine of not more than four thousand dollars, or both.

See *post*, § 557; Code Civ. Proc., § 1123.

§ 48a. **Comptroller not to be interested in tax sales.**— The comptroller, or any person employed in his office, who shall be directly or indirectly interested in any tax sale made by such comptroller, or in the title acquired by such sale, or in any money paid or to be paid for the redemption of any lands sold for taxes or on the cancellation of any tax sale; or any person who shall pay or give to the state comptroller, or to any employe in his office, any compensation, reward or promise thereof for any service or services performed or to be performed in regard to such sale, redemption, cancellation or such tax title, is guilty of a misdemeanor. A sale in violation of this section is void.

Added Laws 1898, ch. 692; takes effect October 1, 1898.

§ 48b. **Prison officers not to be interested in prison contracts.**— A superintendent of state prisons, or agent, warden

or other officer, keeper or guard, employed at either of the prisons, who

1. Shall be directly or indirectly interested in any contract, purchase or sale, for, by, or on account of such prison; or

2. Accepts a present from a contractor or contractor's agent, directly or indirectly, or employs the labor of a convict or another person employed in such prison on any work for the private benefit of such superintendent, officer, keeper or guard, is guilty of a misdemeanor, except that the agent and warden shall be entitled to employ prisoners for necessary household service.

Added Laws 1893, ch. 692; takes effect October 1, 1893.

§ 48c. Appraiser taking fee or reward.—An appraiser appointed by virtue of the taxable transfers law, who takes any fee or reward from an executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay such tax, or any portion thereof, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect October 1, 1893.

§ 49. Taking reward for omitting or delaying official acts.—An executive officer who asks or receives any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty, is guilty of a misdemeanor.

§ 50. Taking fees for services not rendered.—An executive officer who asks or receives any fee or compensation for any official service which has not been actually rendered, except in cases of charges for prospective costs, or of fees demandable in advance in the cases allowed by law, is guilty of a misdemeanor.

§ 51. Taking unlawful reward for services in extradition of fugitives.—An officer of this state who asks or receives any fee or compensation of any kind for any service rendered or expense incurred in procuring from the governor of

this state a demand upon the executive authority of a state or territory of the United States, or of a foreign government, for the surrender of a fugitive from justice; or for any service rendered or expense incurred in procuring the surrender of such fugitive, or of conveying him to this state, or for detaining him therein, except upon an employment by the governor of this state, is guilty of a misdemeanor.

See *People ex rel. Gardenier v. Supervisors*, 134 N. Y. 1; affirming, 56 Hun. 20.

§ 52. **Corrupt bargain for appointments, etc.**—A person who gives or offers to give any gratuity or reward, in consideration that himself or any other person shall be appointed to a public office, or to a clerkship, deputation, or other subordinate positions, in such an office, or shall be permitted to exercise, perform, or discharge any prerogatives or duties, or to receive any emoluments of such an office, is guilty of a misdemeanor.

All agreements which interfere with the integrity, discretion or freedom of the electing or appointing power are illegal. 2 Pom. Eq. Jur. 448; *Meechem's Public Officers*, § 300; *Bish. Cont.*, § 500. See *Laws 1863*, chap. 51; 2 R. S. (Edm.) 719, § 86.

A candidate for a county office announced in a circular to the voters and tax payers that he was willing to discharge the duties of the office for a less salary than that established by law. *Held*, that such offer was illegal, and that votes influenced by it should be rejected. *State v. Purdy*, 36 Wis. 213; 17 Am. Rep. 485. See, also, *Mechem's Public Officers*, § 377.

An agreement made between A. and B., rival candidates for the same office, whereby A. was to withdraw and run for another office, B. promising to pay all his past and future expenses, *held* void. *Robinson v. Kalbfleisch*, 5 Thomp. & Cook, 212.

An agreement by a deputy sheriff to allow to his principal a sum in gross, not payable out of the profits of the office, and which may, therefore, exceed such profits, is a violation of the statute. *Becker v. Ten Eyck*, 6 Paige, 68; *Tappan v. Brown*, 9 Wend. 175.

Where the deputy of a public officer is by law entitled to certain fees in virtue of his office, if he agrees to give a portion of such fees to the officer appointing him, it is a purchase of the deputation. *Becker v. Ten Eyck*, 6 Paige, 68; *Tappan v. Brown*, 9 Wend. 175.

A sheriff may legally make an agreement with his deputy, or with the jailer appointed by him, for a division with him of the fees and profits of their employment. *Becker v. Ten Eyck*, 6 Paige, 68; *Mott v. Robins*, 1 Hill, 21.

Where two persons apply to the governor of the state to be appointed to the same office, and it is agreed that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them, such a contract is illegal and void. *Gray v. Hook*, 4 N. Y. 449.

§ 53. **Corrupt bargain for appointments, etc.**—A person who asks or receives, or agrees to receive, any gratuity or reward, or any promise thereof, for appointing another person, or procuring for another person any appointment to a public office or to a clerkship, deputation, or other subordinate position in such an office, is guilty of a misdemeanor. If the person so offending is a public officer, a conviction also forfeits his office.

See 2 R. S. (Edm.) 719, § 36; see, also, cases cited under § 52, *ante*.

§ 54. **Selling right to official powers.**—A public officer who, for any reward, consideration or gratuity, paid, or agreed to be paid, directly or indirectly, grants to another the right or authority to discharge any functions of his office, or permits another to make appointments or perform any of its duties, is guilty of a misdemeanor, and a conviction for the same forfeits his office and disqualifies him forever from holding any office whatever under this state.

See 2 R. S. (Edm.) 918, § 35; see, also, cases cited under § 52, *ante*.

§ 55. **Such appointment avoided by conviction.**—A grant, appointment, or deputation, made contrary to the provisions of either of the last two sections is avoided and annulled by a conviction for the violation of either of those sections, in respect to such grant, appointment, or deputation; but any official act done before conviction, is unaffected by the conviction.

§ 56. **Intrusion into public office.**—A person who willfully intrudes himself into a public office, to which he has not been duly elected or appointed, or who, having been an executive or administrative officer, willfully exercises any of the functions of his office, after his right so to do has ceased, is guilty of a misdemeanor.

See Code Civ. Proc., § 1496; *Matter of Gray*, 2 N. Y. Cr. Rep. 307; 1 R. S. (Birdseye's ed.) 21, §§ 50–58; *Meechem's Public Officers*, § 321; *Hamlin v. Karlsrufer*, 15 Oregon, 456; 8 Am. St. Rep. 176.

§ 57. **Offender refusing to surrender to successor.**—A person who, having been an executive or administrative officer, wrongfully refuses to surrender the official seal, or any books or papers, appertaining to his office, upon the demand of his lawful successor, is guilty of a misdemeanor.

A judge has no right to enforce the delivery of books and papers unless the applicant's title to the office is clear and free from reasonable doubt. *People v. Stevens*, 5 Hill, 616; *Devlin's Case*, 5 Abb. Pr. 281; *Matter of Whiting*, 1 Edm. Sel. Cas. 498.

A person holding office after the legal appointment of his successor, and refusing to deliver up books and papers, held a proper case for the issuing of a warrant under the statute. *Matter of Whiting*, 2 Barb. 513; *Welch v. Cook*, 7 How. 282; *Matter of Baker*, 11 How. 418; *Matter of Davis*, 19 id. 323; *In re Bartlett*, 9 id. 414.

What constitutes possession of a public office. *Conover's Case*, 5 Abb. Pr. 73; *Cobee v. Davis*, 8 How. 367; *People v. Dikeman*, 7 id. 367.

§ 58. **Administrative officers.** — The various provisions of this chapter which relate to executive officers apply to administrative officers, in the same manner as if administrative and executive officers were both mentioned.

As to who are the executive and administrative officers of the state, see 1 R. S. (8th ed.) 367.

TITLE VII.

OF CRIMES AGAINST THE LEGISLATIVE POWER.

SECTION 59. Preventing the meeting or organization of either branch of the legislature.

60. Disturbing the legislature while in session.
61. Compelling adjournment.
62. Intimidating a member of the legislature.
63. Compelling either house to perform or omit any official act.
64. Altering draft of bill.
65. Altering engrossed copy.
66. Bribery of members of legislature.
67. Receiving bribes by members of legislature.
68. Witnesses refusing to attend before the legislature or legislative committees.
69. Refusing to testify.
70. Members of the legislature liable to forfeiture of office.

§ 59. **Preventing the meeting or organization of either branch of the legislature.** — A person who willfully and by force or fraud prevents the legislature of this state, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is punishable by imprisonment in a state prison not less than five years nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or by both.

§ 60. Disturbing the legislature while in session. — A person who willfully disturbs the legislature of this state, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house of the legislature, tending to interrupt its proceedings or impair the respect due to its authority, is guilty of a misdemeanor.

§ 61. Compelling adjournment. — A person who willfully and by force or fraud compels or attempts to compel the legislature of this state, or either of the houses composing it, to adjourn or disperse, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by fine of not less than five hundred dollars, nor more than two thousand dollars, or by both.

§ 62. Intimidating a member of the legislature. — A person who willfully, by intimidation or otherwise, prevents any member of the legislature of this state, from attending any session of the house of which he is a member, or of any committee thereof, or from giving his vote upon any question which may come before such house, or from performing any other official act, is guilty of a misdemeanor.

See §§ 46, 127.

§ 63. Compelling either house to perform or omit any official act. — A person who willfully compels or attempts to compel either of the houses composing the legislature of this state to pass, amend or reject any bill, or resolution, or to grant or refuse any petition, or to perform or omit to perform any other official act, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or by both.

§ 64. Altering draft of bill. — A person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

§ 65. Altering engrossed copy.— A person who fraudulently alters the engrossed copy or enrollment of any bill which has been passed by the legislature of this state, with intent to procure it to be approved by the governor or certified by the secretary of state, or printed or published by the printer of the statutes in language different from that in which it was passed by the legislature, is guilty of felony.

§ 66. Bribery of members of the legislature.— A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a member of the legislature, or attempts, directly or indirectly, by menace, deceit, suppression of truth, or other corrupt means, to influence a member to give or withhold his vote, or to absent himself from the house of which he is a member, or from any committee thereof, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

See 2 R. S. (Edm.) 703, § 9; Laws 1853, chap. 539; 2 Whart. Crim. Law, §§ 1857, 1858; N. Y. State Const., art. XV, §§ 1, 2, 3; *Sulston v. Norton*, 3 Burr, 1235; *State v. Ellis*, 4 Vroom, 102; *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851.

§ 67. Receiving bribes by members of legislature.— A member of either of the houses composing the legislature of this state, who asks, receives, or agrees to receive, any bribe upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or who gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is punishable by imprisonment in state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or both.

See 2 R. S. (Edm.) 703, § 10; Laws 1853, chap. 539; N. Y. Const., §§ 1, 2, 3; 2 Whart. Crim. Law, §§ 1857, 1858; *Sulston v. Norton*, 3 Burr, 1235; *Marshall v. Balt. & O. R. R. Co.*, 16 How. (U. S.) 314; *Fuller v. Dame*, 18 Pick. 470; *Hatsfield v. Guldsen*, 7 Watts, 152; *Wood v. McCarr*, 6 Dana, 366; *Walsh v. People*, 68 Ill. 58; *Com. v. Callahan*, 2 Va. Cas. 460; *Hunt v. Test*, 8 Ala. 719.

§ 68. Witnesses refusing to attend before the legislature or legislative committees.— A person who, being duly summoned to attend as a witness before either house of the legislature or any committee thereof, authorized to summon witnesses, refuses or neglects without lawful excuse to attend pursuant to such summons, is guilty of a misdemeanor.

See 2 R. S. (Edm.) 704, § 14a; N. Y. Const., art. XV, § 6; Laws 1853, chap. 537; *People v. McDonald*, 99 N. Y. 463; *People v. Sharp*, 107 N. Y. 446; *Matter of Dalton*, 7 Crim. Law Mag. 601, 607, n.; Cooley Const. Lim. (5th ed.) 160-162.

§ 69. Refusing to testify.— A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, willfully refuses to be sworn or affirmed, or to answer any material or proper question, or to produce upon reasonable notice any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor.

See 2 R. S. (Edm.) 704, § 15a; Laws 1853, chap. 539; *People v. Sharp*, 107 N. Y. 446; *People v. McDonald*, 99 N. Y. 463; 3 N. Y. Cr. Rep. 353; 32 Hun, 539; *People v. Learned*, 5 Hun, 626; *People v. Webb*, 5 N. Y. Supp. 855.

§ 70. Members of the legislature liable to forfeiture of office.— The conviction of a member of the legislature of either of the crimes defined in this chapter, involves as a consequence, in addition to the punishment prescribed by this Code, a forfeiture of his office; and disqualifies him from ever afterwards holding any office under this state.

See 3 R. S. (6th ed.) 957, § 10; 2 R. S. (3 Edm.) 703, § 10

TITLE VIII.

OF CRIMES AGAINST PUBLIC JUSTICE.

- CHAPTER**
- I. Bribery and corruption.
 - II. Rescues.
 - III. Escapes and aiding therein.
 - IV. Forging, stealing, mutilating and falsifying judicial and public records and documents.
 - V. Perjury and subornation of perjury
 - VI. Falsifying evidence.
 - VII. Other offenses against public justice.
 - VIII. Conspiracy.

CHAPTER I.

BRIBERY AND CORRUPTION.

- SECTION** 71. Bribery of a judicial officer.
 72. Officer accepting bribe.
 73. Juror, etc., promising verdict.
 74. Juror, etc., accepting bribes.
 75. Embracery.
 76. Misconduct of officers at drawing of jurors.
 77. Misconduct of officers having charge of juries.
 78. Certain punishments.
 79. Offender a competent witness, etc.
 80. Bribery of witnesses.
 81. Definition of "jurors."

§ 71. Bribery of a judicial officer.—A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a judicial officer, juror, referee, arbitrator, appraiser, or assessor, or other person authorized by law to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereupon, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

See 2 R. S. (Edm.) 703, § 9; 4 Bl. Com. 189; 2 Whart. Crim. Law, § 1857; *State v. Carpenter*, 20 Vt. 9; 1 Hawk. P. C., bk. 1, chap. 67, § 6; *State v. Ellis*, 4 Vroom (N. J.), 102; *People v. Sharp*, 107 N. Y. 437; *Klugman's Case*, 49 How Pr. 484; *People v. Jaehne*, 103 N. Y. 190.

The crime is complete without tender and production of money. *People v. Ah Fook*, 62 Cal. 493.

§ 72. Officer accepting bribe.—A judicial officer, a person who executes any of the functions of a public office not designated in titles six and seven of this Code, or a person employed by or acting for the state, or for any public officer in the business of the state, who asks, receives, or agrees to receive a bribe, or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years,

or by fine of not more than five thousand dollars, or both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any public office under the state.

See 2 Edm. Stat. 703, § 10; *People v. Sharp*, 107 N. Y. 489; *People v. O'Neil*, 109 id. 351.

The crime of bribery, committed by a member of the common council of New York city after Penal Code took effect, is punishable under this section. *People v. Jaehne*, 103 N. Y. 183; 4 N. Y. Cr. Rep. 478; 128 U. S. 189; 6 N. Y. Cr. Rep. 289.

A police officer, taking money in consideration of his promise not to arrest a certain class of offenders, is guilty of receiving a bribe under a statute denouncing the receiving of a bribe by any executive officer in a matter which "may be brought before him in his official capacity." *People v. Markham*, 64 Cal. 157; 49 Am. Rep. 700.

An indictment which charges that the officer received a promissory note as a bribe, does not charge the receiving of a thing of value, is bad and will be quashed on motion. *State v. Walls*, 54 Ind. 561.

§ 73. Juror, etc., promising verdict.—A juror, or a person drawn or summoned to attend as a juror, or a person chosen arbitrator, or appointed referee, who either,

1. Makes any promise or agreement to give a verdict, judgment, report, award or decision, for or against any party; or

2. Willfully receives any communication, book, paper, instrument or information relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of that cause or matter;

Is guilty of a misdemeanor.

See Code Civ. Proc., § 1122; 2 R. S. (Edm.) 703, § 12; id. 694, § 16; *People, ex rel. Munsell, v. Oyer and Terminer*, 86 Hun, 277; 3 N. Y. Cr. Rep. 309; 101 N. Y. 245.

§ 74. Juror, etc., accepting bribes.—A juror, referee, arbitrator, appraiser or assessor, or other person authorized by law to hear or determine any question, matter, cause, controversy, or proceeding, who asks, receives, or agrees to receive, any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment or decision shall be influenced thereby, is punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both.

See Code Civ. Proc., § 1198; *People v. Sharp*, 107 N. Y. 489; 12 State Rep'r 20.

§ 75. **Embracery.**— A person who influences or attempts to influence improperly a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend as such a juror, or one chosen an arbitrator, or appointed a referee in respect to his verdict, judgment, report, award or decision, in any cause or matter pending or about to be brought before him, in any case, or in any manner not included in the last two sections, is guilty of a misdemeanor.

See Code Civ. Proc., § 1122; *People v. Selleck*, 4 N. Y. Cr. Rep. 329.

Embracery defined. *Gibbs v. Dewey*, 5 Cow. 503; *State v. Sales*, 2 Nev. 269.

Conversing with juror during address of counsel. *Turner v. Beardsley*, 19 Wend. 348; *State v. Sales*, 2 Nev. 269.

§ 76. **Misconduct of officers at drawing of jurors.**— A person authorized by law to assist at the drawing or impanneling of grand or trial jurors to attend a court, or a term of a court, or to try any cause or issue, who either

1. Designedly puts, or consents to the putting, upon a list of jurors as having been drawn, any name which was not lawfully drawn for that purpose; or

2. Designedly omits to place on such a list any name which was lawfully drawn; or

3. Designedly signs or certifies a list of such jurors as having been drawn which was not lawfully drawn; or

4. Designedly withdraws from the box, or other receptacle for the ballots containing the names of such jurors, any paper or ballot lawfully placed or belonging there and containing the name of a juror, or omits to place in such box or receptacle any name lawfully drawn or designated, or places in such box or receptacle a paper or ballot containing the name of a person not lawfully drawn and designated as a juror; or

5. In the drawing of such jurors, does any act which is unfair, partial or improper in any other respect;

Is guilty of a misdemeanor.

But this section shall not apply to the city and county of New York or the county of Kings.

See Code Civ. Proc., § 1122.

§ 77. **Misconduct of officer having charge of juries.**— An officer to whose charge any juror is committed by a court or

magistrate, who negligently or willfully permits them, or any of them, without leave of the court or magistrate

1. To receive any communication from any person ;
 2. To make any communication to any person ;
 3. To obtain or receive any book or paper, or refreshment ; or
 4. To leave the jury room,
- Is guilty of a misdemeanor.

§ 78. Certain punishments.— A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a person executing any of the functions of a public office, other than one of the officers or persons designated in title six, title seven and section seventy-one of title eight of this Code, with intent to influence him in respect to any act, decision, vote or other proceeding, in the exercise of his powers or functions, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

3 R. S. (6th ed.) 957, § 9; 2 R. S. (Edm.) 704, § 9; Laws 1853, chap. 539; 2 Laws 1869, p. 1793. See, also, § 418, *post*; *People v. Sharp*, 107 N. Y. 427; *People v. Richmond*, 5 N. Y. Cr. Rep. 97; *People v. Jachne*, 103 N. Y. 191.

§ 79. Offender a competent witness, etc.— A person offending against any provision of any foregoing sections of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted, shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution.

3 R. S. (6th ed.) 958, § 14; 2 R. S. (Edm.) 704, § 14a; Laws 1853, chap. 539. See, also, *post*, § 712; *People v. Sharp*, 107 N. Y. 427; 5 Harv. L. Rev. 24.

§ 80. Bribery of witnesses.— A person who is, or is about to be, a witness upon a trial, hearing or other proceeding, before any court or any officer authorized to hear evidence or take testimony, who receives, or agrees, or offers to receive, a bribe, upon

any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing or other proceeding, is guilty of a felony.

2 R. S. (Edm.) 704, §§ 3 and 8; also § 118, *post*.

§ 81. **Definition of "jurors."**—The word "juror" as used in this chapter includes a talesman, and extends to jurors in all courts, whether of record or not of record, and in special proceedings, and before any officer authorized to impanel a jury, in any case or proceeding.

CHAPTER II.

RESCUES.

SECTION 82. Rescue of prisoner.

82. Taking, etc., property in officer's custody.

§ 82. **Rescue of prisoner.**—A person who, by force or fraud, rescues a prisoner from lawful custody, or from an officer or other person having him in lawful custody, is guilty of a felony, if the prisoner was held upon a charge, commitment, arrest, conviction or sentence of felony; and if the prisoner was held upon a charge, arrest, commitment, conviction or sentence for misdemeanor, the rescuer is guilty of a misdemeanor.

See Code Civ. Proc., § 14, subd. 4; *id.*, § 587; 2 Hawk Pl. C., chap. 21, § 8; 4 Bl. Com. 481; 1 Whart. Cr. Law (8th ed.), § 1680; *Com. v. Filburn*, 119 Mass. 297; *State v. Murray*, 15 Me. 100.

A defendant not indictable under the statute, unless it appear that the prisoner was committed on a distinct charge of felony. *People v. Washburn*, 10 Johns. 160. See, also, *People v. Rose*, 12 *id.* 389.

It is competent to prove that the prisoner advised an accomplice to break jail and escape. *People v. Rathbun*, 21 Wend. 508.

§ 83. **Taking, etc., property in officer's custody.**—A person who takes from the custody of an officer or other person personal property, in charge of the latter, under any process of law, or who willfully injures or destroys such property, is guilty of a misdemeanor.

See Code Civil Proc., § 14, subd. 4; *id.*, § 587; 2 R. S. (Edm.) 519, § 23; *Laws of 1837*, p. 521, chap. 457; *Simpson v. St. John*, 93 N. Y. 363.

CHAPTER III.

ESCAPES, AND AIDING THEREIN.

SECTION 84. Escaping prisoner may be recaptured.

85. Prisoner escaping.

86. Attempt to escape from state prison.

87. Aiding escape.

88. Aiding escape.

89. Officer suffering escape.

90. Officer suffering escape forfeits office.

91. Concealing escaped prisoner.

92. Definition of prison.

93. Definition of prisoner.

§ 84. **Escaping prisoner may be recaptured.** — A prisoner, in custody under sentence of imprisonment for any crime, who escapes from custody, may be recaptured and imprisoned for a term equal to that portion of his original term of imprisonment which remained unexpired upon the day of his escape.

See Code Crim. Proc., § 186; 30 Eng. Rep. 513; 1 Bish. Cr. Proc. (3d ed.), §§ 168, 1882-5; 3 Crim. Law Mag. 206, note; *People v. Haggerty*, 53 N. Y. 476; *People v. Potter*, 1 Park. 47; 1 Edm. Sel. Cas. 235; *Matter of Edwards*, 25 Alb. L. J. 68.

§ 85. **Prisoner escaping.** — A prisoner who, being confined in a prison, or being in lawful custody of an officer or other person, by force or fraud escapes from such prison or custody, is guilty of felony if such custody or confinement is upon a charge, arrest, commitment, or conviction for a felony; and of a misdemeanor if such custody or confinement is upon a charge, arrest, commitment or conviction for a misdemeanor.

A common jail is a "prison" within the meaning of this section. *People v. Johnson*, 46 Hun, 667; 110 N. Y. 141.

A prisoner in criminal proceedings can take no action before the court where he has escaped out of custody and still remains at large. *People v. Genet*, 59 N. Y. 80; 17 Am. Rep. 315; *Matter of O'Byrne*, 29 State Rep. 116; 55 Hun, 488; *Warwick v. State*, 73 Ala. 486; 49 Am. Rep. 59; *Sargent v. State*, 96 Ind. 93; 5 Crim. Law Mag. 709; *Smith v. United States*, 94 U. S. 97; *Wilson v. Com.* 10 Bush, 526; 19 Am. Rep. 76; *People v. Redinger*, 55 Cal. 290; 36 Am. Rep. 32; *M'Gowan v. People*, 104 Ill. 100; 44 Am. Rep. 87. See, also, 41 Am. Dec. 272; 9 Crim. Law Mag. 439; 12 id. 1017; 13 id. 107.

A writ of error will not be quashed on motion of the people, though it appear that after the allowance of such writ the prisoner escaped and fled the jurisdiction of the court. *People v. Sharkey*, 1 Hun, 300.

It is no defense to an indictment for escape that the jail was unhealthy and filthy. *State v. Davis*, 14 Nev. 489; 38 Am. Rep. 563.

§ 86. Attempt to escape from state prison. — A prisoner confined in a state prison for a term less than for life, who attempts by force or fraud, although unsuccessfully, to escape from such prison, is guilty of felony.

§ 87. Aiding escape. — A person who, with intent to effect or facilitate the escape of a prisoner, whether the escape is effected or attempted or not, enters a prison, or conveys to a prisoner any information, or sends into a prison any disguise, instrument, weapon, or other thing, is guilty of felony, if the prisoner is held upon a charge, arrest, commitment, or conviction for a felony; and of a misdemeanor, if the prisoner is held upon a charge, arrest, commitment, or conviction for a misdemeanor.

Lying in wait near a jail for the purpose of conveying away a prisoner, though a misdemeanor at common law, is not aiding a prisoner to escape under the statute. *People v. Tompkins*, 9 Johns. 70.

A prisoner who attempts to escape by breaking prison, in consequence of which a fellow prisoner escapes, is guilty of aiding the latter in escaping. *People v. Rose*, 12 Johns. 339.

§ 88. Aiding escape. — A person who aids or assists a prisoner in escaping, or attempting to escape, from the lawful custody of a sheriff, or other officer or person, is guilty of a misdemeanor, if the prisoner is held under arrest, commitment, or conviction for a misdemeanor, or upon a charge thereof; and of a felony if the prisoner is held under an arrest, commitment, or conviction for a felony, or upon a charge thereof.

A defendant was not indictable under the former statute for aiding a prisoner to escape, unless it appear that the latter was committed on a distinct charge of felony. *People v. Washburn*, 10 Johns. 180; *People v. Rose*, 12 id. 339; *People v. Tompkins*, 9 id. 70.

§ 89. Officer suffering escape. — A sheriff, or other officer or person, who allows a prisoner, lawfully in his custody, in any action or proceeding, civil or criminal, or in any prison under his charge or control, to escape or go at large, except as permitted by law, or connives at or assists such escape, or omits an act or duty whereby such escape is occasioned, or contributed to, or assisted, is,

1. If he corruptly and willfully allows, connives at, or assists the escape, guilty of a felony;

2. In any other case, is guilty of a misdemeanor.

See § 58, *ante*, and §§ 114, 115, *post*.

§ 90. Officer suffering escape forfeits office.—An officer who is convicted of the offense specified in the first subdivision of the last section, forfeits his office, and is forever disqualified to hold any office or place of trust, honor or profit, under the constitution or laws of this state.

§ 91. Concealing escaped prisoner.—A person who knowingly or willfully conceals, or harbors for the purpose of concealment, a person who has escaped or is escaping from custody, is guilty of a felony if the prisoner is held upon a charge or conviction of felony, and of a misdemeanor if the person is held upon a charge or conviction of misdemeanor.

2 R. S. (Edm.) 705, § 155.

§ 92. Definition of prison.—The term "prison," as used in this chapter, means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest.

2 Whart. Crim. Law, § 1675; *Com. v. Felburn*, 119 Mass. 297; *State v. Beebe*, 18 Kans. 589; *R. v. Bootle*, 2 Burr, 864; *People v. Johnson*, 46 Hun, 671.

§ 93. Definition of prisoner.—The term "prisoner," as used in this chapter, means any person held in custody under process of law, or under lawful arrest.

CHAPTER IV.

FORGING, STEALING, MUTILATING AND FALSIFYING JUDICIAL AND PUBLIC RECORDS AND DOCUMENTS.

SECTION 94. Injury, etc., to public record.

95. Offering false or forged instruments to be filed or recorded.

§ 94. Injury, etc., to public record.—A person who willfully and unlawfully removes, mutilates, destroys, conceals or obliterates a record, map, book, paper, document, or other thing, filed or deposited in a public office or with any public officer by authority of law, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both.

See § 114, *post*.

A count in an indictment, for mutilating a document deposited with a public officer, by authority of law, is demurrable where it appears, on the face of the indictment, that the document in question, so filed with defendant as su-

pervisor, under the election laws was a *certified copy* of the return of the inspectors of election, the statute requiring that the *original* return should be so filed with the supervisor. *People v. Wise*, 8 N. Y. Cr. Rep. 898; 2 How. Pr. (N. S.) 92.

The value of the book or paper is of no importance, but must be a paper, proceeding or record of a court. *Ayres v. Covill*, 18 Barb. 268.

§ 95. Offering false or forged instruments to be filed or recorded.—A person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed or registered or recorded under any law of this state or of the United States, is guilty of felony.

CHAPTER V.

PERJURY AND SUBORNATION OF PERJURY.

SECTION 96. Perjury.

- 97. Irregularities in the mode of administering oaths.
- 98. Incompetency of witness no defense for perjury.
- 99. Witness' knowledge of materiality of his testimony not necessary
- 100. Making of deposition, etc., when deemed complete.
- 101. Statement of that which one does not know to be true.
- 102. Summary committal of witnesses who have committed perjury.
- 103. Witnesses necessary to prove the perjury, may be bound over to appear.
- 104. Documents necessary to prove such perjury may be detained.
- 105. Subornation of perjury defined.
- 106. Punishment of perjury and subornation.

§ 96. Perjury.—A person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, willfully and knowingly testifies, declares, deposes, or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit or certificate, any material matter to be true which he knows to be false, is guilty of perjury.

See 2 Bish. Crim. Law (7th ed.), §§ 1014-1056; Code Civ. Proc., § 851.

Pleading in indictments for. See Code Crim. Pro., § 291. On the trial of an indictment for perjury, there must be some proof of oath taken, independent of the magistrate's certificate, signature, seal and jurat. *Case v. People*, 6 Abb. N. C. 152; 76 N. Y. 242.

To constitute perjury the oath must be taken before some person competent to administer it. *Wood's Case*, 4 City Hall Rec. 130; *Wickoff v. Humphrey*, 1 Johns. 498. See 2 Bish. Crim. Law (7th ed.), § 1020.

As to what constitutes perjury before a fire marshal, see *Harris v. People*, 64 N. Y. 148.

Under this section the questions and answers in a referee's report in supplementary proceedings may be admitted in evidence on trial of an indictment for perjury notwithstanding the provisions of section 2460 of the Code of Civil Procedure. *Woods v. Ross*, 28 Daily Reg. 265.

In *People v. Dishler*, 38 Hun, 175; 4 N. Y. Cr. Rep. 188, it was held that to justify a conviction under this section, it must be shown that the falsity of the testimony was known to the witness at the time it was given; and further, that a conviction cannot be had where it appears that the testimony was given under an honest mistake or apprehension, and the witness honestly believes that the testimony given was true.

On a trial for perjury it is unnecessary to show that the notary whose name was signed to the jurat was such officer, before allowing him to testify that he administered the oath. *Bragle v. People*, 10 Abb. N. C. 300.

What is a sufficient deposition on information for perjury; facts and not conclusions must be stated. *Bragle v. People*, 10 Abb. N. C. 300; 4 Law Bull. 34.

A person is guilty of perjury who swears falsely as to a fact material to a defense set up in an action, although such defense would fail without proofs of other facts. *People v. Grimshaw*, 20 Week. Dig. 116; 3 N. Y. Cr. Rep. 390; 38 Hun, 507; *Wood v. People*, 59 N. Y. 117.

False swearing not perjury if court not legally constituted. *People v. Tracy*, 9 Wend. 265.

Recent cases sustain the view that perjury may be assigned upon false testimony going to the credit of a witness who gives material evidence. *People v. Courtney*, 94 N. Y. 494; *Williams v. State*, 12 Cr. L. Mag. 458.

There is no just reason for refusing to treat false swearing as perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue to be found. *People v. Courtney*, 94 N. Y. 494. See *Pendergrast Case*, 3 City Hall Rec. 11; *Geston v. People*, 4 Lans. 487; 61 Barb. 35.

As to the doctrine of materiality in the law of perjury, see Prof. Chase's articles, 3 Crim. Law Mag. 459.

If the matter sworn to, be in fact immaterial, it is not perjury, though the witness believes it to be so. *Rouse v. Ross*, 1 Wend. 475.

Where a defendant has made two contradictory depositions, and the second shows that the first was intentionally false, this is sufficient to convict him of perjury in swearing to the former deposition. *People v. Burden*, 9 Barb. 467.

In *Dempsey v. People*, 20 Hun, 261, it was held that a false affidavit made by a coroner as to the fact of holding an inquisition was not shown to have been made willfully and corruptly.

A person may commit perjury by testifying to something true in fact, if he has no knowledge whether it is true or false. *People v. McKinney*, 8 Park. 510; *Van Steenburgh v. Korts*, 10 Johns. 167.

And in swearing that he believes a fact to be true which he knows to be false. *People v. Robertson*, 3 Wheeler Cr. Cas. 180.

Swearing to a statement as being true to the best of affiant's knowledge, information and belief, not perjury. *People v. Lambert*, 6 Abb. N. C. 181; reversing 14 Hun, 512.

Nor upon an affidavit before an officer *de facto*. *People v. Lambert*, 6 Abb. N. C. 181.

It is not necessarily perjury to swear to an affidavit without knowing its contents. To constitute perjury in such a case the act must be willful and the party must be aware of the fact at the time he takes the oath that he does not know the contents of the paper. *Byrnes v. Byrnes*, 102 N. Y. 4; 4 East. Repr. 601.

A surety cannot be held guilty of willfully and falsely swearing to the sum he is worth in an undertaking, when it appears that he made the statement upon an erroneous assumption as to the validity of a certain by-law of a bank, which was subsequently held to be void. *Nathans v. Hope*, 100 N. Y. 615; 2 East. Repr. 655.

It is legal and material to ask an applicant to the police commissioners for an appointment as policeman, whether he has ever been complained of, indicted for, or convicted of, any criminal offense, and perjury may be predicated on his false answer to such question. *People v. Link*, 4 N. Y. Supp. 435; 6 N. Y. Cr. Rep. 185.

The comptroller has authority to receive and act upon affidavits produced to him and the testimony of witnesses, for the purpose of deciding the question of the validity of tax sales as between the state and the purchaser, and may administer oaths to witnesses, and violation of such oaths is perjury. *People, ex rel. Ostrander, v. Chapin*, 7 N. Y. St. Rep. 209; affirmed, 105 N. Y. 309.

One who verifies an account may be indicted for perjury even though he was not the proper party to verify it. *People v. Bowe*, 34 Hun, 528; 3 N. Y. Cr. Rep. 159.

If a bank officer make willful false statements in his report to the superintendent of the banking department, he is guilty of perjury. *People v. Vail*, 57 How. 81; 6 Abb. N. C. 206; *People v. Clements*, 11 State Rep. 384.

Perjury may be assigned on an oath taken to obtain exemption from execution. *Gilbert's Case*, 1 City Hall Rec. 163. Or on an oath taken in justifying as bail. *Tomlinson's Case*, 4 City Hall Rec. 125. Or on an affidavit to found a *certiorari*. *Pratt v. Price*, 11 Wend. 127. Or as subscribing witness to the execution of a deed. *Tuttle v. People*, 36 N. Y. 431. Or upon an oath erroneously taken. *Van Steenburgh v. Korts*, 10 Johns. 167.

Perjury may be committed in testifying that one accused of drunkenness was not drunk at the time charged. *Com. v. Edison*, 38 Alb. L. J. 337.

Perjury cannot be assigned on an extra-judicial oath. *Wood's Case*, 4 City Hall Rec. 130; *People v. Travis*, 4 Park. 213. Or on evidence given under an oath administered by arbitrators where the submission is not according to the statute. *People v. Townsend*, 5 How. Pr. 315. Or on a false oath to a protest

before a notary public as part of the preliminary proofs in a case of marine loss. *People v. Travis*, 4 Park. 213; 1 Buff. Super. Ct. 545.

Where the prisoner handed to an officer, authorized to take and certify affidavits, an affidavit previously signed by him, and reciting that he had been duly sworn, and the officer affixed his own signature to the jurat without any words or formalities, *held*, that perjury could not be predicated of the transaction. *O'Reilly v. People*, 86 N. Y. 154; 40 Am. Rep. 525.

Perjury cannot be predicated of an affidavit sworn to before a notary public professing to act in the city of New York, but who was a non-resident of the state at that time and at the time of his appointment. *Lambert v. People*, 76 N. Y. 230; 32 Am. Rep. 293; 6 Abb. N. C. 181.

Not perjury where defendant's verification to answer denied an immaterial allegation of complaint. *People v. Christopher*, 4 Hun, 805.

A conviction cannot be had upon the uncorroborated testimony of one witness. *People v. Stone*, 33 Hun, 41.

The falsity of the oath must be proved by two witnesses, but the materiality of the testimony is to be deduced from all the circumstances of the case. *Johnson's Case*, 1 C. H. Rec. 21. Or by one witness supported by strong corroborating circumstances. *Merritt's Case*, 4 C. H. Rec. 58.

In *United States v. Ambrose*, 108 U. S. 386, on the trial of an indictment against a clerk of a circuit and district court for perjury in swearing before a district judge to his emolument returns, and an account for services rendered to the United States, it was held, that the words "declarations" and "certificate," as employed in section 5392 of the Revised Statutes, are used, in the ordinary and popular sense, to signify any statement of material matters of fact sworn to and subscribed by the party charged; that the returns and accounts set forth in the indictments were written declarations within the meaning of said section; that the written statement and oath of the party, together, constitute the declaration or the certificate of the statute, for the falsity of which a party is chargeable with perjury.

§ 97. Irregularities in the mode of administering oaths.

It is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner. The term "oath," includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

See Code Civ. Proc., §§ 842-849; *Matter of Carpenter*, 64 Cal. 267.

As to requisites of a valid oath, see *People v. O'Reilly*, 61 How. Pr. 3; reversed, 86 N. Y. 154; 24 Alb. L. J. 312.

An oath administered irregularly, *e. g.*, upon a book other than the Bible, the parties administering and taking it supposing it to be a Bible, is valid. *People v. Cook*, 8 N. Y. 84; 14 Barb. 287.

There being the ordinary jurat that affiant was duly sworn, the presumption is that he was so sworn. *Fryatt v. Linde*, 3 Edw. 289.

Where the affiant does not appear before the officer, he is not guilty of perjury. *Case v. People*, 76 N. Y. 242.

"The Supernatural Element in the Oath," 18 Alb. L. J. 413.

"Kissing the Book," 25 Alb. L. J. 339.

"The Abolition of Oaths," 29 Alb. L. J. 844.

"Swearing by Telephone," 26 Alb. L. J. 326; 47 id, 301.

§ 98. Incompetency of witness no defense for perjury.—

It is no defense to a prosecution for perjury that the defendant was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he actually was permitted to give such testimony or make such deposition or certificate.

See *Chamberlain v. People*, 23 N. Y. 85; *People v. Bowe*, 3 N. Y. Cr. Rep. 151; 84 Hun, 532.

§ 99. Witness' knowledge of materiality of his testimony not necessary.—

It is no defense to a prosecution for perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have affected such proceeding.

See authorities cited under section 96.

A person is guilty of perjury who swears falsely as to a fact material to a defense set up in an action, although such defense would fail without proofs of other facts. *People v. Grimshaw*, 20 Week. Dig. 116; 2 N. Y. Cr. Rep. 390; *Wood v. People*, 59 N. Y. 117.

§ 100. Making of deposition, etc., when deemed complete.—The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the defendant to any other person with intent that it be uttered or published as true.

People v. Allen, 9 State Rep. 627; *People v. O'Reilly*, 61 How. Pr. 3; reversed, 86 N. Y. 154; *Kane v. City of Brooklyn*, 114 id. 591.

§ 101. Statement of that which one does not know to be true.—An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.

See *People v. Dishler*, 83 Hun, 176; 4 N. Y. Cr. Rep. 190.

§ 102. Summary committal of witnesses who have committed perjury.—Where it appears probable to a court of record that a person, who has testified before it in an action or proceeding in that court, has committed perjury in any testimony

so given, the court may immediately commit him, by an order or process for that purpose, to prison, or take a recognizance, with sureties, for his appearing and answering to an indictment for perjury.

§ 103. **Witnesses necessary to prove the perjury may be bound over to appear.**— In a case specified in the last section, the court may bind over witnesses to establish the perjury, to appear at the proper court to testify before a grand jury, and also upon the trial, in case an indictment is found for the perjury. It must cause immediate notice of any such commitment or recognizance, with the names of the witnesses so bound over, to be given to the district attorney of the county.

§ 104. **Documents necessary to prove such perjury may be detained.**— In such a case, if a paper or document, produced by either party, is deemed by the court necessary to be used in the prosecution for the perjury, the court may detain the same, and direct it to be delivered to the district attorney.

§ 105. **Subornation of perjury defined.**— A person, who willfully procures or induces another to commit perjury, is guilty of subornation of perjury.

As to indictment for subornation of perjury, see Code Crim. Proc., § 291.

The jury cannot convict on the uncorroborated testimony of a single witness. *People v. Evans*, 40 N. Y. 1.

Where an attorney, for the purpose of procuring depositions of several witnesses, sent money beforehand to them in considerable sums, together with answers to the interrogatories annexed to the commission, and it turned out that such depositions were wholly false, though it did not appear clearly that said attorney knew they were false, *held*, that though the facts were insufficient to constitute subornation of perjury, the conduct of the attorney was entirely improper, reprehensible and deserved the severe censure of the court. *In re Eldridge*, 9 N. Y. Week. Dig. 6; 82 N. Y. 161.

§ 106. **Punishment of perjury and subornation.**— Perjury and subornation of perjury are each punishable as follows:

1. When the perjury is committed upon the trial of an indictment for felony, by imprisonment for a term not exceeding twenty years.

2. In any other case, by imprisonment for a term not exceeding ten years. [*In effect, as amended, May 18, 1892.*]

CHAPTER VI.

FALSIFYING EVIDENCE.

SECTION 107. Offering false evidence.

108. Deceiving a witness.

109. Preparing false evidence.

110. Destroying evidence.

111. Preventing or dissuading witnesses from attending.

112. Inducing another to commit perjury.

113. Bribing witnesses.

§ 107. **Offering false evidence.**—A person who, upon any trial, hearing, inquiry, investigation, or other proceeding authorized by law, offers or procures to be offered in evidence, or to be used on a motion as genuine, a book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered, is guilty of felony.

§ 108. **Deceiving a witness.**—A person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any witness or person about to be called as a witness, upon any trial, proceeding, inquiry or investigation whatever, conducted by authority of law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

See *Matter of Eldridge*, 9 Week. Dig. 6; 82 N. Y. 161.

§ 109. **Preparing false evidence.**—A person who fraudulently makes or prepares any false record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced in evidence, or on a motion, as genuine, upon any trial, hearing, investigation, inquiry, or other proceeding, authorized by law, is guilty of a felony.

§ 110. **Destroying evidence.**—A person who, knowing that a book, paper, record, instrument in writing, or other matter or thing, is or may be required in evidence, or on a motion, upon any trial, hearing, inquiry, investigation, or other proceeding, authorized by law, willfully destroys the same, with intent thereby to prevent the same from being produced, is guilty of a misdemeanor.

§ 111. Preventing or dissuading witnesses from attending. — A person who willfully prevents or dissuades any person who has been duly summoned or subpoenaed as a witness from attending, pursuant to the summons or subpoena, is guilty of a misdemeanor.

§ 112. Inducing another to commit perjury. — A person who without giving, offering or promising a bribe, incites or attempts to procure another to commit perjury, or to give false testimony as a witness, though no perjury is committed or false testimony given, or to withhold true testimony, is guilty of a misdemeanor.

See cases cited under § 105, *ante*.

§ 113. Bribing witnesses. — A person who gives or offers or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false testimony or to withhold true testimony, is guilty of a felony.

See § 80, *ante*

CHAPTER VII.

OTHER OFFENSES AGAINST PUBLIC JUSTICE.

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 167. False auditing and paying claims.

§ 114. Injury to records and misappropriation by ministerial officers. — A sheriff, coroner, clerk of a court, constable or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either

1. Mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his office; or,

2. Fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him in virtue of his office, is guilty of felony.

2 R. S. (Edm.) 700, §§ 69, 70. See §§ 58, 94, *ante*, and §§ 470, 472, *post*; *Ayres v. Covill*, 18 Barb. 268.

§ 115. **Permitting escapes, and other unlawful acts, committed by ministerial officers.**—A sheriff, coroner, clerk of a court, constable or other ministerial officer and every deputy or subordinate of any ministerial officer, who either

1. Receives any gratuity or reward, or any security or promise of one, to procure, assist, connive at, or permit any prisoner in his custody to escape, whether such escape is attempted or not; or,

2. Commits any unlawful act tending to hinder justice, is guilty of a misdemeanor.

See 2 R. S. (Edm.) 706, § 18; 2 Whart. Cr. Law, § 1668; 1 Hale, 600; *Blus v. Com.*, 4 Watts, 215; *Shattuck v. State*, 51 Miss. 575; see, also, §§ 58, 89, 90, *ante*.

§ 116. **Neglecting or refusing to execute process.**—An officer who, in violation of a duty imposed upon him by law to receive a person into his official custody, or into a prison under his charge, willfully neglects or refuses so to do, is guilty of a misdemeanor.

See § 154, *post*.

§ 117. **General provision as to neglect, etc.**—A public officer, or person holding a public trust or employment, upon whom any duty is enjoined by law, who willfully neglects to perform the duty, is guilty of a misdemeanor. This and the preceding section do not apply to cases of official acts or omissions, the prevention or punishment of which is otherwise specially provided by statute.

See §§ 154, 471, 684, *post*; *People v. Meakin*, 133 N. Y., 214.

Neglect of official duty by board of education. See *Williams v. People*, 15 Week. Dig. 317; *People v. Com. Council*, 16 Abb. N. C. 114; 2 How. Pr. (N. S.) 68.

The officers before whom oaths and affidavits may be taken are bound to administer them when requested, and a refusal to do so subjects them to indictment for misdemeanor. *People v. Brooks*, 1 Den. 457.

To render the neglect willful it is only necessary to show that it was intentional. *People v. Brooks*, 1 Den. 457.

An officer of a municipal corporation is a public officer within the statute. *People v. Bedell*, 2 Hill, 196.

§ 117a. **Neglect of county officer to make report.**—A county officer or an officer whose salary is paid by the county, who neglects or refuses to make a report under oath to the board of supervisors of such county on any subjects or matters connected with the duties of his office, whenever required by resolution of such board, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 118. **Delaying to take person arrested for crime before a magistrate.**—A public officer or other person having arrested any person upon a criminal charge, who willfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

See Code Crim. Proc., § 165; and § 556, *post*.

§ 119. **Making arrests, etc., without lawful authority.**—No sheriff of a county, mayor of a city, or officials, or other person authorized by law to appoint special deputy sheriffs, special constables, marshals, policemen, or other peace officers in this state, to preserve the public peace or quell public disturbance, shall hereafter, at the instance of any agent, society, association or corporation, or otherwise, appoint as such special deputy, special constable, marshal, policemen, or other peace officer, any person who shall not be a citizen of the United States and a resident of the state of

New York, and entitled to vote therein at the time of his appointment, and a resident of the same county as the mayor or sheriff or other official making such appointment; and no person shall assume or exercise the functions, powers, duties or privileges incident and belonging to the office of special deputy sheriff, special constables, marshal or policemen, or other peace officer, without having first received his appointment in writing from the authority lawfully appointing him. Any person or persons who shall, in this state, without due authority, exercise, or attempt to exercise the functions of, or hold himself out to any one as a deputy sheriff, marshal, or policeman, constable or peace officer, or any public officer, or person pretending to be a public officer, who, unlawfully, under the pretense or color of any process, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements without a regular process therefor, or any person who knowingly violates any other provision of this section, is guilty of a misdemeanor. But nothing herein contained shall be deemed to affect, repeal or abridge the powers authorized to be exercised under sections one hundred and two, one hundred and four, one hundred and sixty-nine, one hundred and eighty-three, eight hundred and ninety-five, eight hundred and ninety-six and eight hundred and ninety-seven of the Code of Criminal Procedure; or under chapter three hundred and forty-six of the laws of eighteen hundred and sixty-three, as amended by chapter two hundred and fifty-nine of the laws of eighteen hundred and sixty-six, and chapter one hundred and ninety-three, of the laws of eighteen hundred and seventy-five; or under chapter two hundred and twenty-three of the laws of eighteen hundred and eighty; or under chapter five hundred and twenty-seven of the laws of eighteen hundred and seventy-three; or under chapter two hundred and five of the laws of eighteen hundred and seventy-five; but all places kept for summer resorts and the grounds of racing associations in the counties of New York, Kings and Westchester, are hereby exempted from the provisions of this act. [*In effect, as amended, April 9, 1892.*]

See § 556, *post*; Code Crim. Proc., § 183.

§ 120. Misconduct in executing search warrant.—An officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

See §§ 159, 556, *post*.

An officer may, in executing a search warrant made out in proper form, on demand of entrance and refusal, break down the outer or other door of a house. *Ball v. Clapp*, 10 Johns. 263.

§ 121. Refusing to aid officer in making an arrest.—A person who, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, is guilty of a misdemeanor.

§ 122. Refusing to make an arrest.—A person who, after having been lawfully commanded by any magistrate to arrest another person, willfully neglects or refuses so to do, is guilty of a misdemeanor.

§ 123. Resisting execution of process, aiding escapes, etc., in county which has been proclaimed in insurrection.—A person, who, after proclamation issued by the governor declaring a county to be in a state of insurrection, resists, or aids

in resisting, the execution of process in such county, or who aids or attempts the rescue or escape of another from lawful custody or confinement in such county, or who resists, or aids in resisting a force ordered out by the governor to quell or suppress an insurrection, is guilty of a felony.

§ 124. Resisting public officer in the discharge of his duty. — A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging, or attempting to discharge, a duty of his office, is guilty of a misdemeanor.

See § 47, *ante*.

§ 125. Compounding crimes. — A person who takes money or other property, gratuity or reward, or an engagement or promise therefor, upon an agreement or understanding, express or implied, to compound or conceal a crime, or a violation of statute, or to abstain from, discontinue or delay, a prosecution therefor, or to withhold any evidence thereof, except in a case where a compromise is allowed by law, is guilty

1. Of a felony, punishable by imprisonment in a state prison for not more than five years, where the agreement or understanding relates to a felony punishable by death, or by imprisonment in a state prison for life;

2. Of a felony, punishable by imprisonment in a state prison for not more than three years, where the agreement or understanding relates to another felony;

3. Of a misdemeanor, punishable by imprisonment in a county jail for not more than one year, or by fine of not more than two hundred and fifty dollars, or both, where the agreement or understanding relates to a misdemeanor, or to a violation of a statute for which a pecuniary penalty or forfeiture is prescribed.

See Code Crim. Proc., §§ 664-666; *Devos v. Davis*, 8 State Rep'r, 727.

To compound a crime is to agree not to prosecute it when the party so agreeing knows it to have been committed. 2 Whart. Crim. Law (8th ed.), § 1559.

"Compounding a felony is the act of a party immediately aggrieved who agrees with a thief or other felon that he will not prosecute him on condition that he returns to him the stolen goods, or who takes a reward not to prosecute." 3 Am. and Eng. Encyc. of Law, 899, and cases cited.

The offense of compounding a felony is complete at the time when the agreement to abstain from prosecuting is made; and it is unnecessary in an

indictment for such an offense to allege that the prisoner did abstain from prosecuting, and that by reason of such abstention the thief escaped prosecution. *Reg. v. Burgess*, 16 Q. B. Div. 141; 15 Cox C. C. 779; 36 Eng. Rep. 662.

Any person having knowledge that a felony has been committed, and entering into an agreement to abstain from prosecuting, or to hinder the ends of justice, is guilty of the offense of compounding a felony; and that offense is not confined to the owners of stolen property entering into such agreements. *Reg. v. Burgess*, 16 Q. B. Div. 141; 15 Cox C. C. 779; 36 Eng. Rep. 662.

The compounding of a felony or other crime is an indictable offense, and no action can be supported on any contract of which such offense is the consideration, either in whole or in part. *Hinesburg v. Sumner*, 9 Vt. 23; *Bell v. Wood*, 1 Bay (S. C.), 244; *Com. v. Pease*, 16 Mass. 91; *Plumer v. Smith*, 5 N. H. 553. See *Bothwell v. Brown*, 51 Ill. 234.

All the authorities hold that an agreement to compound a felony will not be enforced, and that any security based upon such a consideration is void. But as to misdemeanors a distinction has been made. Some authorities hold that those misdemeanors which are personal in their nature between the parties, such as bastardy and a common assault, unaccompanied with riot or intent to kill, may be compromised. *Maurer v. Mitchell*, 9 Watts & Serg. 69; *Robinson v. Orenshaw*, 2 Stew. & Port. 276; *Price v. Summers*, 2 Southard, 573; *Holcomb v. Stimpson*, 8 Vt. 141. The last case was a prosecution for bastardy, and the decision was placed on the ground that it was a civil suit. But where the offense is in whole or in part of a public nature, nearly all the authorities hold that no agreement to stifle a public prosecution for it can be valid. *Pay v. Oatley*, 6 Wis. 42; *Commonwealth v. Johnson*, 3 Cush. 454; *Hinesborough v. Sumner*, 9 Vt. 23; *Bowen v. Buck*, 28 id. 308; *Shaw v. Reed*, 30 Me. 105; *Shaw v. Spooner*, 9 N. H. 197; *Clark v. Ricker*, 14 id. 44; *Kimbrough v. Lane*, 11 Bush (Ky.), 556; *Peed v. McKee*, 42 Iowa, 649; *Buck v. First National Bank*, 27 Mich. 293; *Gardner v. Maxey*, 9 B. Monroe, 90; *Kier v. Lehman*, 6 C. B. 306.

The compounding of misdemeanors is illegal as much as that of felonies. See 16 Am. L. Reg. (N. S.) 267; *Jones v. Rice*, 18 Pick. 440; *Pearce v. Wilson*, 111 Penn. St. 14; 56 Am. Rep. 243; *McMahon v. Smith*, 47 Conn. 221; 36 Am. Rep. 67. But the mere taking of one's goods back again, or receiving reparation, is no offense, if no favor is shown or agreed to be shown to the thief. *Plumer v. Smith*, 5 N. H. 553.

A misdemeanor cannot be compounded by the parties, except by the consent of the court and approbation of the district attorney. *Gilmore's Case*, 2 C. H. Rec. 29; *Collins' Case*, 4 id. 139.

Assault and battery cannot be compromised after conviction. *People v. Bishop*, 5 Wend. 111.

A note given to compound a felony is invalid. *Conderman v. Hicks*, 3 Lans. 108. See Tiedeman Com. Paper, § 183.

It is unnecessary to prove an express agreement to compound the crime, in order to render the note invalid. *Id.*; *Conderman v. Trenchard*, 58 Barb. 165.

Money paid in settlement of a felony cannot be recovered back. *Daimouth v. Bennett*, 15 Barb. 541.

A contract to drop a prosecution for a felony is immoral and illegal; and if money is paid thereon by a third person he is "*particeps criminis*." *Id.*

It is not a compounding of a felony for the holder of forged paper to accept payment of the same and surrender it up, although he knows it to be forged, no proceedings having been taken against the forger. *Kissock v. House*, 23 Hun, 35, 36.

§ 126. **Conviction of primary offender, etc.** — Upon the trial of an indictment for compounding a crime, it is not necessary to prove that any person has been convicted of the crime or violation of statute, in relation to which an agreement or understanding herein prohibited was made.

See § 32, *ante*.

A party indicted for compounding a larceny cannot plead the acquittal of the person charged with larceny as a bar to his own conviction. *People v. Buckland*, 13 Wend. 592.

§ 127. **Intimidating, etc., public officer.** — A person who directly or indirectly addresses any threat or intimidation to a public officer, or to a juror, referee, arbitrator, appraiser or assessor, or to any other person authorized by law to hear or determine any controversy or matter, with intent to induce him contrary to his duty, to do or make, or to omit or delay any act, decision or determination, is guilty of a misdemeanor.

See §§ 61, 62, 63, *ante*, § 464, *post*; *Smith v. Botens*, 36 State Rep. 53.

An attorney is guilty of contempt for sending to a grand jury, while engaged in the discharge of its duties, an accusatory and threatening letter for the purpose of exasperating the jurors by the aspersions upon their official conduct which it contained, or of deterring them from performing their duties by the threats of public clamor which it expressed, or of creating a distrust and want of confidence in any action which might be taken as the result of their investigation. *Matter of Tyler*, 71 Cal. 351.

§ 128. **Suppressing evidence.** — A person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein any book, paper or other thing which might be evidence, or from procuring the attendance or testimony of any witness therein, or with intent to prevent any person having in his possession any book, paper or other thing which might be evidence in such suit or proceeding, or to prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor.

See §§ 110, 111, *ante*.

§ 129. Buying lands in suit. — A person who takes a conveyance of any lands or tenements, or of any interest or estate therein, from any person not being in the possession thereof, while such lands or tenements are the subject of controversy, by suit in any court, knowing the pendency of such suit, and that the grantor was not in possession of such lands or tenements, is guilty of a misdemeanor.

See *Chamberlain v. Taylor*, 12 Abb. N. C. 478.

§ 130. Buying pretended titles. — A person who buys or sells, or in any manner procures, or takes or makes any covenant or promise to convey any right or title, real or pretended, to any lands or tenements, unless the grantor thereof or the person making such covenant or promise has been in possession, or he and those by whom he claims, have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such covenant or promise made, is guilty of a misdemeanor.

See Bish. Crim. Law (7th ed.), §§ 136-140; *Chamberlain v. Taylor*, 12 Abb. N. C. 478; *Dansiger v. Boyd*, 120 N. Y. 628; 30 State Rep. 893.

§ 131. Mortgage of lands under adverse possession not prohibited. — The last two sections shall not be construed to prevent any person having a just title to lands, in the adverse possession of another, from executing a mortgage upon such lands, nor shall said sections apply to any conveyance or release of lands or tenements to any person in the lawful possession thereof.

§ 132. Common barratry defined. — Common barratry is the practice of exciting groundless judicial proceedings.

See 4 Bl. Com. 134, 135; 2 Bish. Crim. Law (7th ed.), §§ 63-69; 2 Am. and Eng. Encyc. of Law, 127; 21 Alb. L. J. 440; *Com. v. Davis*, 11 Pick. 432; *Com. v. McCulloch*, 15 Mass. 227; *Com. v. Tubbs*, 1 Cush. 2; *Com. v. Mohn*, 53 Penn. St. 248.

§ 133. Declared a misdemeanor. — Common barratry is a misdemeanor.

§ 134. What proof is required. — No person can be convicted of common barratry, except upon proof that he has excited

actions or legal proceedings, in at least three instances, and with a corrupt or malicious intent to vex and annoy.

A single instance not barratry. *Voorhees v. Dorr*, 51 Barb. 580, 581.

§ 135. **Interest.** — Upon a prosecution for common barratry, the fact that the defendant was himself a party in interest or upon the record to any action or legal proceeding complained of, is not a defense.

§ 136. **Buying demands for suit by an attorney.** — An attorney or counselor who violates section seventy-three of the Code of Civil Procedure, relating to buying demands, or section seventy-four of the Code of Civil Procedure relating to certain promises and gifts, is guilty of a misdemeanor.

See 3 Am. and Eng. Encyc. of Law, 68; 89 Alb. L. J. 427; 2 Whart. Crim. Law (8th ed.), § 1854; 2 Story Eq. Jur., § 1050; 2 Pom. Eq. Jur., § 936; *The Carl Jackson*, 29 Fed. Rep. 896; 4 Civ. Proc. Rep. 414, note; *Hoag v. Weston*, 10 id. 95; 1 N. Y. State Rep. 585.

Sections 73, 74 and 75, Code of Civil Procedure, read as follows:

"§ 73. An attorney or counselor shall not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon."

"§ 74. An attorney or counselor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received."

"§ 75. An attorney or counselor, who violates either of the last two sections, is guilty of a misdemeanor, and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court."

In *West v. Kurtz*, 15 Civ. Proc. 426, the court say: "The statute prohibiting attorneys and counselors at law from buying bonds, promissory notes, etc., with the intent and for the purpose of bringing actions thereon, was enacted to prevent an evil more common in former times than now; hence, there are not many recent decisions on the subject; but we think former adjudications fully establish the following:

"1st. The mere fact of the purchase of a bond, mortgage, etc., by an attorney, is not evidence of a purchase with the intent, and for the purpose of bringing an action thereon. *Hall v. Bartlett*, 9 Barb. 297; *Bristol v. Dann*, 13 Wend. 142; *Williams v. Matthews*, 8 Cow. 252; *Warren v. Helmer*, 8 How. Pr. 421.

"2d. An attorney may purchase bonds, etc., for investment, or for profit, or for the protection of other interests, and the purchase is not made illegal by an intent to bring suit, if necessary, for collection. *Moses v. McDivitt*, 88 N. Y. 62. [*Baldwin v. Latson*, 2 Barb. Ch. 306.]

3d. To constitute the offense, the primary purpose must be to bring suit, and that intent must not be merely incidental and contingent. *Moses v. McDivitt*, 88 N. Y. 62.

"And 4th. That the purchase must be made for the very purpose of bringing suit. *Moses v. McDivitt*, 88 N. Y. 62; 8 Abb. N. C. 47."

The statute is not applicable to a demand purchased with the intent of prosecuting it in a justices' court. *Goodell v. People*, 5 Park. 206.

The statute does not forbid the buying a judgment for the purpose of collecting it by execution. *Warner v. Paine*, 3 Barb. Ch. 630; *Brotherson v. Consalus*, 26 How. 213.

Buying stock and bringing suit as a stockholder not within the statute. *Ramsey v. E. R. R. Co.*, 8 Abb. (N. S.) 17.

The statute covers purchases at judicial sales, made under direction of an officer of court. *Mann v. Fairchilds*, 2 Keyes, 106; 14 Barb. 548; *Hall v. Gird*, 7 Hill, 586; *Arden v. Patterson*, 5 Johns. Ch. 44; *Barry v. Whitney*, 3 Sandf. 696; *Voorhees v. Dorr*, 51 Barb. 587; *Ramsey v. Gould*, 57 id. 396.

An attorney who is a junior judgment creditor may purchase a prior judgment for his own protection. *Van Rensselaer v. Sheriff of Onondaga*, 1 Cow. 443.

An attorney may stipulate with his client for an agreed compensation, and may make it absolute or contingent, but he cannot agree to advance the money needed to carry on the prosecution as an inducement for the placing the claim in his hands. *Coughlin v. Railroad Co.*, 71 N. Y. 433; reversing 8 Hun, 136.

Contingent fees not within the statute. *Ely v. Cooke*, 2 Abb. Dec. 14; *Marsh v. Holbrook*, 3 id. 176.

§ 137. Buying demands by a justice or constable, for suit before a justice. — A justice of the peace or a constable who, directly or indirectly, buys or is interested in buying, anything in action, for the purpose of commencing a suit thereon before a justice, is guilty of a misdemeanor.

§ 138. Corruption in obtaining claims for collection. — A justice of the peace or constable who, directly or indirectly, gives, or promises to give, any valuable consideration to any person as an inducement to bring, or in consideration of having brought, a suit thereon before a justice, is guilty of a misdemeanor.

§ 139. Forfeiture of office. — A person convicted of a violation of any of the three preceding sections, in addition to the punishment, by fine and imprisonment, prescribed therefor by this Code, forfeits his office.

§ 140. Receiving claims, in what cases allowable.— Nothing in the four preceding sections shall be construed to prohibit the receiving in payment of anything in action for any estate, real or personal, or for any services of an attorney or counselor actually rendered, or for a debt antecedently contracted; or the buying or receiving of anything in action for the purpose of remittance, and without any intent to violate the preceding sections.

The purchasing of a note by a practicing attorney not unlawful where he is a creditor of the holder and the purchase is made for the purpose of securing a debt, without intent to evade the statute. *Watson v. McLaren*, 19 Wend. 557; *Baldwin v. Latson*, 2 Barb. Ch. 306. See *Mann v. Fairchild*, 2 Keyes, 106.

Does not prohibit purchase of a mortgage by an attorney, and a foreclosure by advertisement and sale. *Hall v. Bartlett*, 9 Barb. 297.

Attorneys and counselors at law are prohibited from the receiving of any promissory note, etc., except in payment for real estate or personal sold, for services rendered, for a debt antecedently contracted, or for the purpose of making a remittance, although such note, etc., be not purchased for collection, or for the purpose of bringing a suit thereon. *People v. Walbridge*, 3 Wend. 120. See, also, *Gerdell v. People*, 5 Park. 206.

The purchase of the stock of a corporation by an attorney is not a violation of the statutes, it not being one of the securities mentioned. *Ramsey v. Gould*, 57 Barb. 398.

§ 141. Application of previous sections to persons prosecuting in person.—The provisions of sections one hundred and thirty-six, one hundred and thirty-eight and one hundred and forty, relative to the buying of claims by an attorney, counselor, justice of the peace or constable, with intent to prosecute them, or to the lending or advancing of money by an attorney or counselor, in consideration of a claim being delivered for collection, apply to every case of such buying a claim, or lending or advancing money, by any person prosecuting in person an action or legal proceeding.

§ 142. Witness' privilege restricted.—No person shall be excused from testifying, in any civil action or legal proceeding, to any facts showing that a thing in action has been bought, sold or received contrary to law, upon the ground that his testimony might tend to convict him of a crime. But no evidence derived from the examination of such person shall be received against him upon a criminal prosecution.

See 5 Harv. L. Rev. 24.

§ 143. **Criminal contempts.** — A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor :

1. Disorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority ;

2. Behavior of the like character, committed in the presence of a referee or referees, while actually engaged in a trial or hearing, pursuant to the order of the court, or in the presence of a jury, while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law ;

3. Breach of the peace, noise or other disturbance, directly tending to interrupt the proceedings of a court, jury or referee ;

4. Willful disobedience to the lawful process or other mandate of a court ;

5. Resistance willfully offered to its lawful process or other mandate ;

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory ;

7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full and fair report of a trial, argument, decision or other proceeding had in court.

See 2 Bish. Crim. Law (7th ed.), §§ 241-273; 2 Broom & Hadley Com. (Wait's ed.) 436; 8 Am. and Eng. Encyc. of Law, 777; 12 Am. Dec. 178; 4 Eng. Rep. 256; Moak's Underhill Torts, 196; 5 Crim. Law Mag. 151, 483, 647; 15 Crim. Brief, 6; 33 Alb. L. J. 145.

In criminal contempt, as distinguished from those to enforce civil remedies, it is the satisfaction of the wounded dignity of the law, and the respect due to the tribunals of justice, that is sought. *Conover v. Wood*, 5 Abb. 84; *King v. Flynn*, 37 Hun, 335.

The power of the court to punish as for a criminal contempt should not be exercised unless the acts constituting it are clearly proven. *Weeks v. Smith*, 3 Abb. 211.

If the order disobeyed be capable of a construction favorable to the innocence of a party, punishment will not be ordered. *Id.*

It is a criminal contempt for an attorney to erase a portion of a verification of an answer served on him, and then to return it as insufficient. *Bernard v. Leo*, 7 Daily Reg. 1069, 1213.

Relator was a juror in the case of *People v. Short*, who was tried for assault with intent to kill Phelan at the office of O'Donovan Rossa. Short was ac-

quitted, and the trial judge afterward ascertained that at a recess during the trial the relator had visited Rossa's office. The judge thereupon committed the relator for contempt. *Held*, that the conduct of the juror in visiting the place where the assault took place was not punishable as a contempt, for the reason (1) that it was not a private or civil contempt, for it invaded no right of an individual suitor before the court, and involved no question or duty of indemnity to an individual litigant; and (2) it was not a criminal contempt, because not one of the offenses enumerated in the statute. *People, ex rel. Munsell, v. Oyer and Terminer*, 101 N. Y. 245; 4 N. Y. Cr. Rep. 70; 3 How. (N. S.) 418; reversing 36 Hun, 277.

An advertisement inviting the trade to subscribe toward the expenses of an appeal, and also offering a reward for documentary evidence needed, is not a contempt of court. *Plating Co. v. Farquharson*, 17 Ch. Div. 49; 87 Eng. Rep. 1'3.

Subdiv. 1. *Matter of Watson*, 3 Lans. 408; *Matter of Percy*, 2 Daly, 530; *Bergh's Case*, 16 Abb. Pr. (N. S.) 266; *Matter of Griffin*, 1 N. Y. Supp. 7; *Watson v. People*, 11 Colo. 4; *Hill v. Crandall*, 52 Ill. 70; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Baker v. State*, 82 Ga. 776; 14 Am. St. 192.

Where a witness summoned before a grand jury declined to answer, and after the court had ruled on the question repeated his refusal, it was held to be a contempt in the presence of the court. *Matter of Hackley*, 24 N. Y. 74; 12 Abb. 150; 21 How. 54; *People v. Court of O. and T.*, 27 id. 14; *Matter of Gannon*, 11 Pac. Rep. 240.

Where a contempt has been committed in the presence of the court, and the offender, immediately after, leaves the court-room, going into another room in the same building, the court still has jurisdiction, at least on the day of the offense, to order his arrest and imprisonment, without first ordering an attachment to bring him before the court. *Matter of Terry*, 128 U. S. 289.

A newspaper reporter, who conceals himself in the jury-room, and remains there during the deliberations of a jury, with intent to publish an account of their discussion and the result in a newspaper, and so publishes the same, is guilty of a criminal contempt of court committed in the immediate presence of the court, and summarily punishable. *Matter of Choate*, N. Y. Oyer and Term., March 31, 1890, 41 Alb. L. J. 287. Choate was committed to the county jail for thirty days, and fined \$250. The opinion of the General Term dismissing the writ of *certiorari* is reported, 30 State Rep. 728; 56 Hun, 351; 8 N. Y. L. J. 217. This decision was affirmed by Court of Appeals. 121 N. Y. 676; 30 State Rep. 1016. See, also, *Orman v. State*, 24 Tex. App. 495.

A solicitor, who had attended the hearing of an application before a judge at chambers, immediately after such hearing and while the parties were on their way from the judge's room to the entrance gate of the building, made use of grossly abusive expressions and threatening gestures to the solicitor on the other side in relation to such application. *Held*, that he was guilty of a contempt of court, punishable by attachment. *Matter of Johnson*, 20 Q. B. Div. 68; 88 Eng. Rep. 600.

The court when in session is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. *Baker v. State*, 4 L. R. A. 128; 11 Crim. Law Mag. 685.

Attempting, while a witness is in the witness-room or in the hall-way of the court-room to deter him from testifying, by offering him money, is a misbehavior in the presence of the court, and punishable, without indictment, by fine and imprisonment as a contempt. *Matter of Savin*, 131 U. S. 267.

Attempting to bribe or improperly influence a juror is a contempt of court. *Klugman's Case*, 49 How. Pr. 434; *Cuddy's Case*, 131 U. S. 33.

Drawing a pistol and threatening life of counsel during the examination of witness, before an examiner in chancery appointed by a United States circuit court, is a contempt of court, punishable as such; and also an offense against the United States and punishable by indictment or information. *Sharon v. Hill*, 24 Fed. Rep. 726.

Subdiv. 3. *Matter of Terry*, 128 U. S. 289.

Subdiv. 4. *Weeks v. Smith*, 3 Abb. Pr. 211; *People v. Albany, etc., R. Co.*, 20 How. Pr. 358; affirmed, 24 N. Y. 261; 37 Barb. 216; *People v. Hefferman*, 33 How. Pr. 402; *Sherwin v. People*, 100 N. Y. 351; 2 East. Rep. 904; *Bowen v. Hunter*, 45 How. 193.

An indictment under this subdivision should aver that the willful disobedience alleged was, within the terms of the statute, a distinct and clear disobedience of the process or order of the court of record, stated in said indictment. Disobedience of a subpoena is not, under our statute, a criminal offense punishable by indictment. A statutory crime can only be created by phraseology which is clear, direct and unquestionable as to its intention. *Sherwin v. People*, 3 N. Y. Cr. Rep. 524.

The attorney-general during the term of court has no authority to order the clerk to issue a subpoena for a witness to appear before the grand jury to testify as to gaming. If a witness appear under such subpoena and refuse to answer he is not guilty of contempt. *Warner v. State*, 12 Lea, 52.

To punish a party for contempt in not appearing as a witness, a copy of the order requiring him to do so must have been personally served on him. *Loop v. Gould*, 17 Hun, 585; *In re Percy*, 2 Daly, 589.

Where one is served in the city of New York with a subpoena requiring him to attend as a witness on behalf of the people at a court in Albany county, he may be indicted in Albany county for a criminal contempt in case of disobedience. *People, ex rel. Sherwin, v. Mead*, 28 Hun, 227; 92 N. Y. 415.

Subdiv. 6. See *Clark v. Brooks*, 26 How. Pr. 254; *Clapp v. Lathrop*, 23 id. 423; *People v. Marston*, 18 Abb. Pr. 257; *People, ex rel. Valiente, v. Dyckman*, 24 How. Pr. 222; *People, ex rel. Jones, v. Davidson*, 35 Hun, 471; *People v. Fancher*, 2 Hun, 226; *People v. Sharp*, 45 id. 493; 107 N. Y. 427.

A wife refusing to testify in behalf of her husband may be punished for contempt. *People v. Hovey*, 20 Hun, 382; 92 N. Y. 554.

And where, on a trial for murder, the wife having been a witness to the killing, a failure of the husband to call the wife may be considered by the jury. *Id.*

The presumption is that the wife, if called, would tell the truth. *Id.*

Where a judge puts to a witness a question which is not pertinent to any issue before the court at the time the question is put, the refusal of the witness to answer it is no contempt, and the court has no jurisdiction to imprison him for such refusal. *Matter of Zechandelaure*, 12 Pac. Rep. 259.

Subdiv. 7. *Matter of Griffin*, 1 N. Y. Supp. 7.

The defendant had been tried on an indictment and the jury had disagreed. He thereupon published in his newspaper an article intending to cast discredit on the grand jury which indicted him, the sheriff who summoned it, and the judge who presided, and would preside on a second trial. *Held*, a contempt. *Matter of Cheeseman*, 49 N. J. L. 137; 60 Am. Rep. 596.

Libelous newspaper comments on judicial proceedings in concluded cases may not be treated as contempts. *Cheadle v. State*, 110 Ind. 301; 59 Am. Rep. 199.

Although contempts may be pardoned the same as other offenses, it is a power that should be used very sparingly, for it is not to be presumed that a court would unjustly impose a fine or impose an unjust one. 6 Crim. Law Mag. 473. See, also, 2 Am. St. Rep. 862.

§ 144. Grand juror acting after challenge has been allowed.—A grand juror who, with knowledge that a challenge interposed against him by a defendant, has been allowed, is present at, or takes part, or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

See Code Crim. Proc., §§ 242, 243.

§ 145. Disclosure of depositions taken by a magistrate.—A magistrate or clerk of any magistrate who willfully permits any deposition taken on an examination of a defendant before such magistrate, and remaining in the custody of such magistrate or clerk, to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney-general, the district attorney of the county and his assistants, the complainant and his counsel, and the defendant and his counsel, is guilty of a misdemeanor.

§ 146. Disclosure of depositions returned by grand jury with presentment.—A clerk of any court who willfully permits any deposition returned by a grand jury and filed with such clerk, to be inspected by any person, except the court, the deputies or assistants of such clerk, and the district attorney and his assistants, until after the arrest of the defendant, is guilty of a misdemeanor.

See Code Crim. Proc., § 206.

§ 147. **Racing near a court.**—A person concerned in any racing, running or other trial of speed between horses or other animals, within one mile of the place where a court is actually sitting, is guilty of a misdemeanor.

§ 148. **Misconduct by attorneys.**—An attorney or counselor who,

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party as prohibited by section seventy of the Code of Civil Procedure; or,

2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or become answerable for, as prohibited by section seventy-one of the Code of Civil Procedure,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by this Code, he forfeits to the party injured treble damages, to be recovered in a civil action.

See §§ 136, 139, *ante*, and 670, 671, *post*.

The obtaining, by an attorney, of money or property by false or fraudulent representations is not governed by this section, but is larceny under section 528. *People v. Reavy*, 38 Hun, 418; 39 id. 364; 4 N. Y. Cr. Rep. 1.

An attorney who knowingly misleads the court or a party is guilty of criminal deceit under the statute. *Looff v. Lawton*, 14 Hun, 588.

Private fraud by an attorney, but not as an attorney, is not an offense against the statute. *Necen's Case*, 5 City Hall Rec. 79.

§ 149. **Permitting attorney's name to be used.**—If an attorney knowingly permits any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, except as authorized by the next section, such attorney, and every person who shall so use his name, is guilty of a misdemeanor.

A subpoena is a process. *York v. Peck*, 81 Barb. 350.

§ 150. **In what cases lawful.**—Whenever an action or proceeding is authorized by law to be prosecuted or defended in the name of the people, or of any public officer, board of officers or municipal corporation, on behalf of another party, the attorney-general, or district attorney, or attorney of such public officer or board or corporation may permit any proceeding therein, to be taken in his name by an attorney to be chosen by the party in interest.

§ 151. **Production of pretended heir.**—A person who fraudulently produces an infant, falsely pretending it to have been born of a parent whose child is or would be entitled to inherit real property, or to receive a share of personal property, with intent to intercept the inheritance of such real property, or the distribution of such personal property, or to defraud any person out of the same, or any interest therein; or who, with intent fraudulently to obtain any property, falsely represents himself or another to be a person entitled to an interest or share in the estate of a deceased person, either as executor, administrator, husband, wife, heir, legatee, devisee, next of kin, or relative of such deceased person, is punishable by imprisonment in a state prison for not more than ten years.

What constitutes the offense of fraudulently producing an infant, falsely pretending it to have been born of parents whose child would be entitled to inherit property, as prohibited under statute. *People v. Cunningham*, 3 Park. 520; reviewed on other grounds in 3 Park. 531.

§ 152. **Substituting one child for another.**—A person to whom a child has been confided for nursing, education, or any other purpose, who, with intent to deceive a parent, guardian or relative of the child, substitutes or produces to such parent, guardian or relative, another child or person, in place of the child so confided, is punishable by imprisonment in a state prison for not more than seven years.

§ 153. **Importing foreign convicts.**—An owner, master or commander of any vessel arriving from a foreign country, who knowingly lands or permits to land at any port, city, harbor, or place within this state, any passenger, seaman or other person who is a foreign convict of any crime which, if committed within this state, would be punishable therein, without giving notice thereof to the mayor of such city, or other principal municipal officer of such port or place, is guilty of a misdemeanor

See § 440, *post*; Code Crim. Proc., § 674.

§ 154. **Omission of duty by public officer.**—Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Mr. Bishop (1 Crim. Law, 7th ed., §§ 459, 460) says: "Any act or omission, in disobedience of official duty, by one who has accepted public office, is, when of public concern, in general, punishable as a crime. This is particularly so where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion. But this doctrine has its exceptions and qualifications; thus: One serving in a judicial or other capacity in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of the law. His act, to be cognizable criminally, or even civilly, must be willful and corrupt. And if it is strictly judicial, and he is, for instance, a justice of the peace, and has jurisdiction, he will not be liable to the suit of the party, however the law may be as to a criminal prosecution, though corruption is alleged." Citing authorities.

An indictment lies against a justice of the peace who, with the intent to prevent the course of law and justice, discharges an offender brought before him. *People v. Coon*, 15 Wend. 278.

Also for a misbehavior in office, when he acts from corrupt motives. *Id.*

An indictment will lie against commissioners of excise for willfully and corruptly granting license to sell spirituous liquors. *People v. Norton*, 7 Barb. 477.

An officer before whom an oath or affidavit may be taken is bound to administer the same when requested, and a refusal to do so is a misdemeanor. *People v. Brooks*, 1 Den. 457.

If a justice refuse to grant an adjournment because defendant refuses to pay his fees for drawing a bond, he is guilty of a misdemeanor. *People v. Calhoun*, 8 Wend. 421.

A magistrate not of the county where the offense was committed, may not issue a warrant for the arrest of the offender. *Green v. Rumsey*, 2 Wend. 611.

Fraud in the action of election inspectors. *People v. Cook*, 8 N. Y. 87; *Gardner v. People*, 3 Hun, 222.

Breach of duty on the part of highway commissioners. *Clark v. Miller*, 47 Barb. 38; *Bartlett v. Crozier*, 17 Johns. 439.

If a supervisor wickedly abuses or fraudulently exceeds his powers, he is punishable by indictment. *People v. Stocking*, 32 How. 49; 50 Barb. 573.

Willful neglect by an overseer of the poor a misdemeanor. *In re Pickett*, 55 How. 491; *Bently v. Phelps*, 27 Barb. 524.

Liability of the head of department of public buildings, city of New York, for neglect of duty. *Connors v. Adams*, 13 Hun, 427.

§ 154a. Falsely marking enrolled person exempt.—A county clerk who marks "exempt" any person enrolled as liable to military duty, whom he knows not to be exempt, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 155. Commission of prohibited acts.—Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor.

See § 471, *post*.

The law makes it the duty of an overseer of the poor to account for all moneys received and disbursed by him, but prescribes no penalty for the willful neglect of such duty. *Held*, that such willful neglect is a misdemeanor under the statute. *Ex parte Pickett*, 55 How. 491.

In such a case, the prosecution need not prove that the act was done with corrupt intent. *People v. Bogart*, 3 Abb. 202; 3 Park. 143. See, also, *Foot v. People*, 56 N. Y. 321.

"Statute" includes a municipal ordinance. *Mayor v. Eider*, 2 Civ. Proc. 125.

§ 156. Disclosing fact of indictment having been found. A judge, grand juror, district attorney, clerk, or other officer who, except in the due discharge of his official duty, discloses, before an accused person is in custody, the fact of an indictment having been found or ordered against him, is guilty of a misdemeanor.

§ 157. Grand juror disclosing what transpired before the grand jury.—A grand juror who, except when lawfully required by a court or officer, willfully discloses, either

1. Any evidence adduced before the grand jury; or
2. Anything which he himself or any other member of the grand jury said, or in what manner he or any other grand juror voted, upon any matter before them, is guilty of a misdemeanor.

§ 157a. Stenographer disclosing evidence taken before grand jury.—A stenographer appointed to take testimony given before a grand jury who permits any person other than the district attorney to take a copy of such testimony or of any portion thereof or to read the same or any portion thereof, except on the written order of the court, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 158. Instituting suit in false name.—A person who institutes or prosecutes an action or other proceeding in the name of another without his consent and contrary to the statutes, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months.

Section 1900 of Code Civil Procedure reads as follows: "§ 1900. If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding in a court of record or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months."

§ 159. Maliciously procuring search warrant.—A person who maliciously, and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

See Cooley Const. Lim. (5th ed.) 865.

The fourth amendment to the Federal Constitution provides that: "The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

§ 160. Communications with prisoners prohibited.—

A person who:

1. Not being authorized by law or by a written permission from the superintendent of state prisons, visits any state prison or communicates with any prisoner therein without the consent of the agent or warden or without such consent brings into or conveys out of a state prison any letter, or writing to or from any prisoner; or,

2. Conveys into such prison any article prohibited by law or by the rules of the superintendent; is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1898; Laws 1898, ch. 692.

See Code Crim. Proc., § 56.

§ 161. Neglect to return names of constables.— A town clerk who willfully omits to return to the county clerk the name of a person who has qualified as constable, pursuant to law, is punishable by a fine not exceeding ten dollars.

§ 162. Falsely certifying, etc., as to dues.— An officer authorized by law to record a conveyance of real property, or of any other instrument, which by law may be recorded, who knowingly and falsely certifies that such a conveyance or instrument has been recorded, is guilty of a felony.

§ 163. Other false certificates.— A public officer who, being authorized by law to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not expressly provided by law, is guilty of a misdemeanor.

§ 164. Penalty for recording, etc., without acknowledgment.— A public officer authorized to file or record any instrument or conveyance of, or affecting property which is duly proved or acknowledged, who knowingly files or records any such instrument or conveyance which is not accompanied by a certificate according to law, of the proof or acknowledgment, is guilty of a misdemeanor.

The recording officer may refuse to register a deed acknowledged before one who had no title to the office, by virtue of which he claimed to take the acknowledgment. *People v. Brown*, 7 Wend. 493.

§ 165. **False auditing and paying claims.** — A public officer, or a person holding or discharging the duties of any office or place of trust under the state, or in any county, town, city or village, a part of whose duties it is to audit, allow or pay, or take part in auditing, allowing or paying claims or demands upon the state, or such county, town, city or village, who knowingly audits, allows or pays, or directly or indirectly consents to, or in any way connives at the auditing, allowance or payment of any claim or demand against the state, or such county, town, city or village, which is false or fraudulent or contains charges, items or claims which are false or fraudulent, is guilty of felony, punishable by imprisonment for a term not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [*As amended; in effect May 17, 1892.*]

If a supervisor, acting as a member of the board, corruptly, unlawfully and partially votes that an account presented against the county is a county charge, be allowed and made a charge against the county, he is guilty of a misdemeanor, and may be indicted therefor. *People v. Hooking*, 50 Barb. 573.

§ 166. **False auditing and paying claims.** — A person who, being or acting as a public officer or otherwise, by willfully auditing or paying, or consenting to, or conniving at the auditing or payment of a false or fraudulent claim or demand, or by any other means, wrongfully obtains, receives, converts, disposes of or pays out or aids, or abets another in obtaining, receiving, converting, disposing of, or paying out any money or property, held, owned, or in the possession of the state, or of any city, county or village, or other public corporation, or any board, department, agency, trustee, agent or officer thereof, is guilty of a felony, punishable by imprisonment for not less than three nor more than five years, or by a fine not exceeding five times the amount or value of the money or the property converted, paid out, lost or disposed of by means of the act done or abetted by such person, or by both such imprisonment and fine. The amount of any such fine when paid or collected, shall be paid to the treasury of the corporation or body injured. A conviction under this section forfeits any office held by the offender, and renders him incapable thereafter of holding any office or place of trust.

See § 672, *post*.

§ 167. **False auditing and paying claims.** — A transfer in whole or part of any deposit with any bank or other depositary, or of any credit, claim or demand upon such depositary, whereby the right, title or possession of the owner or holder of such deposit, or of any custodian thereof, is impaired or affected, is a conversion thereof under the last section.

CHAPTER VIII.

CONSPIRACY.

- SECTION** 168. Conspiracy defined.
169. Conspiracies against peace, etc.
170. No other conspiracies punishable.
171. Overt act, when necessary.

§ 168. **Conspiracy defined.** — If two or more persons conspire, either

1. To commit a crime; or
2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or
3. Falsely to institute or maintain an action or special proceeding; or
4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or
5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or
6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws;

Each of them is guilty of a misdemeanor.

See 2 Bish. Crim. Law (7th ed.), §§ 769, 240; 4 Am. and Eng. Encyc. of Law, 588; 6 N. Y. Cr. Rep. 861; 13 Eng. Rep. 440.

The law of conspiracy was fully considered in *Lambert v. People*, 9 Cow. 578. See, also, *People, ex rel. Lawrence, v. Brady*, 56 N. Y. 189, 190.

"A conspiracy consists in the unlawful combination or agreement of two or more persons to do an act unlawful in itself, or to do a lawful act by unlawful means." *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun, 588. See, also, *People v. Trequeer*, 1 Wheel. Cr. Cas. 142; *Com. v. Hunt*, 4 Metc. 111; *Duprey's Case*, 4 City Hall Rec. 121; *Roget's Case*, 2 id. 61; *Emmanuel's Case*, 6 id. 83; *Musset Slough Case*, 5 Fed. Rep. 680; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 820; *State v. Barnum*, 15 N. H. 396.

Whenever a new party concurs in the plans originally^a formed, and comes in to aid in their execution, he becomes a fellow conspirator. *People v. Mather*, 4 Wend. 229.

To make an agreement between two or more parties to do an act, innocent in itself, a criminal conspiracy it is not enough that the act is prohibited by statute, but the agreement must have been entered into with a criminal intent. *People v. Powell*, 63 N. Y. 88.

Any combination between two or more persons is a conspiracy when a crime is intended, whether successfully or not, and confederation may be inferred from all the circumstances. *Storm's Case*, 1 City Hall Rec. 169; *Adams v. People*, 9 Hun, 89.

A conspiracy may be proved by circumstantial evidence; and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offense, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offense. *Kelley v. People*, 55 N. Y. 565; 14 Am. Rep. 342.

The unlawful intent is to be inferred from all the circumstances of the case. *People v. Powell*, 63 N. Y. 88.

Combinations to unlawfully advance the price of articles of food are conspiracies. *Leonard v. Poole* (lard), 114 N. Y. 377; *People v. North River Sugar Refining Co.* (sugar), 54 Hun, 354; affirmed, 121 N. Y. 582; 8 Ry. and Corp. L. J. 22; so far as it was held that it was unlawful for corporations formed under the Manufacturing Act of 1848 (Laws 1848, chap. 40) to become a party to such a contract as that creating the Sugar Refining Company; but the views expressed in *dicta* in those decisions upon the collateral questions of monopoly, competition and restraint of trade are neither approved nor disapproved.

To obtain goods by fraud and false representations. *Lewis' Case*, 5 City Hall Rec. 129; *Hitchcock's Case*, 6 id. 43.

Commencing suits against a party for the purpose of extorting money. *Leggett v. Postley*, 2 Paige, 599.

Of sailors' boarding-house keepers not to ship any seamen at the office of certain notaries is a conspiracy. *Emmanuel's Case*, 6 C. H. Rec. 83; *People v. Melvin*, 2 Wh. Cr. C. 262; *People v. Fisher*, 14 Wend. 9; *Van Mater v. Babcock*, 23 Barb. 633.

A defendant may be convicted of a conspiracy [with a deceased person. *People v. Olcott*, 2 Johns. Cas. 301.

A clerk may be convicted of a conspiracy with his employer. *Robbins' Case*, 4 City Hall Rec. 1.

In *California* it is held that a prosecution for conspiracy cannot be maintained against husband and wife. *People v. Miller*, 22 Pac. Rep. 934.

In *People v. Everett*, 51 Hun, 25, the court say: "It does not constitute a conspiracy under our statutes for persons to combine together to commit a trespass upon or to destroy another's property."

A by-law or pledge adopted by an association of workmen, and subscribed by the members, providing that any member found guilty, on investigation by a committee, of working for less than the prices fixed by the association, shall forfeit to it twenty-five per cent of the amount of the price fixed for such work, which penalty may be collected in the name of the corporation by due process of law, is not in violation of subdiv. 6 of the above section. *Master Stevedores' Ass'n v. Welsh*, 2 Daly, 1.

A combination of journeymen who attempt by threats and fines to coerce others to join in a "strike" is a conspiracy. *People v. Melvin*, Yates' S. C. 111; 2 Wheeler Cr. Cas. 269; 6 C. H. Rec. 35; *People v. Fisher*, 14 Wend. 9; *People, ex rel. Gill, v. Smith*, 5 N. Y. Cr. Rep. 509.

Where there is no relation, direct or indirect, between the rate of wages and a strike, the combination which brings the latter about for unlawful purposes is a criminal conspiracy. *People v. Smith*, 5 N. Y. Cr. Rep. 509.

A determination by workmen that an objectionable person, a "scab" so called, shall be driven away and prevented from working within a district large or small, is a conspiracy pronounced by law to be criminal and punishable by imprisonment. *People, ex rel. Hill, v. Walsh*, 15 N. Y. State Rep. 17; 6 N. Y. Cr. Rep. 292.

The unlawful purpose of a strike may be evidenced by force, threats or intimidation to prevent another from exercising an unlawful trade. *People v. Smith*, 5 N. Y. Cr. Rep. 509; *Reg. v. Bauld*, 15 Eng. Rep. 316.

"Boycotting" is an offense under this section. *People v. Kostka*, 4 N. Y. Cr. Rep. 429; *People v. Wileig*, id. 403; *People v. Lenhardt*, id. 317; *Old Dominion Co. v. McKenna*, 18 Abb. N. C. 262; 1 Ry. and Corp. L. J. 218.

In the case last cited, Brown, J., said: "Associations have no more right to inflict injury than individuals have. All combinations and associations designed to coerce workmen to become members or to interfere with, obstruct, vex or annoy them in working or in obtaining work because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination between the wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means and accompanied by damage are actionable. Greenhood Pub. Policy, 648, 653; *People v. Fisher*, 14 Wend. 1; 28 Am. Dec. 509, note; *Tarston v. McGalliter*, Peake, 105; *Rafael v. Verein*, 2 W. Bl. 1055; *Lumby v. Gage*, 2 El. & Bl. 216; *Bowen v. Hall*, 2 Q. B. Div. 333, 337; *Gregory v. Duke, etc.*, 3 M. & G. 205; *Gunther v. Astor*, 4 J. B. Moore, 12; *Reg. v. Rollins*, 17 Ad. & El. (N. S.) 671; *Mogul Co. v. MacGregor*, 15 Q. B. Div. 486; *Waller v. Cronin*,

107 Mass. 555; *Carew v. Rutherford*, 106 id. 1; *State v. Donaldson*, 32 N. J. Law, 151; *Master Stevedores' Ass'n v. Walsh*, 2 Daly, 1, 13; *Johnson v. Meinhardt*, 61 How. Pr. 168; *Slaughter-House Cases*, 16 Wall. 36, 116."

See *Thomas v. Mut. Protective Union*, 121 N. Y. 50. A full discussion of the question of strikes and boycotts will be found in the recent cases of *Crump v. Com.*, 84 Vt. 927; 10 Am. St. Rep. 895; 6 N. Y. Cr. Rep. 342; 38 Alb. L. J. 4, *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 28; 6 N. Y. Cr. Rep. 321; *State v. Stewart*, 59 Vt. 273; 59 Am. Rep. 710; 9 Crim. Law Mag. 693. See, also, id. 1; 10 N. Y. State Bar Ass'n Rep. 148; 35 Alb. L. J. 224.

As to the doctrine of merger of offenses in conspiracy cases, see *State v. Setter*, 54 Conn. 461; 41 Alb. L. J. 129; 14 Am. St. 121; *People v. Mather*, 4 Wend. 265; *People v. Richards*, 1 Mich. 216; 51 Am. Dec. 75, 79, note.

A citizen of this state, who has entered into a conspiracy to violate its laws for his own personal gain, cannot escape punishment because the act he planned was accomplished during his absence from the state. *People v. Lyon*, 1 N. Y. Cr. Rep. 400; 99 N. Y. 219. See, also, *Noyes v. State*, 1 Crim. Law Mag. 215; following *People v. Mather*, 4 Wend. 227.

Indictment must either show that the object aimed at or the means used are criminal. *Lambert v. People*, 9 Cow. 578; *People v. Eckford*, 7 id. 535; *People v. Mather*, 4 Wend. 229; *Elkin v. People*, 28 N. Y. 177; 24 How. 272; *People v. Everest*, 51 Hun, 19.

An indictment for conspiring to cheat and defraud, held sufficient without averring the means to be used or that the conspiracy was unlawful. *Schultz's Case*, 5 City Hall Rec. 112. See, also, *March v. People*, 7 Barb. 391.

An indictment for conspiracy to cheat by false pretenses must state the place at which the alleged pretenses were made. *People v. Barrett*, 1 Johns. 66.

Where the conspiracy is to induce a witness to suppress her evidence, the indictment must aver that the conspirators did persuade and induce her to withdraw herself from the county, etc. *People v. Chase*, 16 Barb. 495.

Indictment may charge A. with conspiring with others unknown. *People v. Mather*, 4 Wend. 229. And it is enough to prove a conspiracy with any person other than A. *Duprey's Case*, 4 City Hall Rec. 121.

On an indictment against two for a conspiracy to cheat, the judgment should be against each defendant severally and not against them jointly. *March v. People*, 7 Barb. 391.

Where parties are acting in concert in a conspiracy, their acts and admissions are evidence against any one of their number. *People v. Sharp*, 45 Hun, 460; 5 N. Y. Cr. Rep. 389, 469; *People v. Bassford*, 3 id. 219; *People v. Murphy*, id. 339; *Loos v. Wilkinson*, 10 State Rep. 297. See, also, 4 Am. and Eng. Encyc. of Law, 631.

Where the evidence is insufficient to prove a conspiracy, evidence of the acts or declaration of the alleged conspirator performed or uttered when defendant was not present, or if present was not participating therein or in some manner assenting thereto, is inadmissible against defendant. *People v. Paolisk*, 7 N. Y. Cr. Rep. 30.

Declarations of alleged co-conspirators made subsequent to the abandonment or accomplishment of a conspiracy cannot be given in evidence against a co-conspirator. *People v. Squire*, 6 N. Y. Cr. Rep. 475.

Whether declarations of alleged co-conspirators can be given in evidence before proof has been given of the conspiracy is a question which rests very largely in the discretion of the trial judge. *People v. Squire*, 6 N. Y. Cr. Rep. 475. But see *Ormsby v. People*, 58 N. Y. 472.

§ 169. **Conspiracies against peace, etc.** — If two or more persons, being out of this state, conspire to commit any act against the peace of this state, the commission or attempted commission of which, within this state, would be treason against the state, they are punishable by imprisonment in a state prison not exceeding ten years.

§ 170. **No other conspiracies punishable.** — No conspiracy is punishable criminally unless it is one of those enumerated in the last two sections, and the orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy.

See § 675, *post*. *People v. Barondess*, 61 Hun, 577; *Rogers v. Everts*, 17 N. Y. Supp. 264.

Workmen have a right to seek by all peaceable means an increase of wages, and all meetings and combinations having that object in view, which are not distinguished by violence or threats, are lawful. *People, ex rel. Gill, v. Walsh*, 6 N. Y. Cr. Rep. 292; 15 State Rep. 17; *People, ex rel. Gill, v. Smith*, 5 N. Y. Cr. Rep. 509.

It is lawful for any number of journeymen, or of master workmen, to agree on the one part that they will not work below certain rates, or, on the other hand, that they will not pay above certain prices. *Master Stevedores' Ass'n v. Welsh*, 2 Daly, 1.

This section does not authorize a combination of individuals to compel, by means condemned in section 168, workmen to join the co-operating forces, or to punish those who are supposed to be inimical thereto. *People, ex rel. Gill, v. Smith*, 5 N. Y. Cr. Rep. 509.

Trades-unions not unlawful unless they interfere with those not members. *Master Stevedores' Ass'n v. Welsh*, 2 Daly, 1.

Any orderly body of men have the legal right to meet and discuss any question concerning their social or pecuniary welfare, and take any action in respect thereto so long as it does not involve or tend to create a breach of the peace. One workman has the right to accost another in the street or elsewhere and invite him to follow his example or join the union. But if these rights are enforced in an illegal manner the police have the right to interfere, and may, in all circumstances, prevent any threatened breach of the peace. *Zeigler v. Nolan*, 2 City Ct. Rep. 54.

§ 171. **Overt act, when necessary.** — No agreement except to commit a felony upon the person of another, or to commit

arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

See Code Crim. Proc., § 398; 2 Bish. Crim. Law (7th ed.), § 192; *People v. Chase*, 16 Barb. 495; *People v. Squire*, 20 Abb. N. C. 375; *Wood v. State*, 47 N. J. L. 180; *People v. Flack*, 84 State Rep. 727; 43 Alb. L. J. 64; 125 N.Y. 324.

§ 171 "A." **Coercion by employers.**—Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations, on behalf of such corporation or corporations, who shall hereafter coerce or compel any person or persons, employe or employes, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employe, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor. The penalty for such misdemeanor shall be imprisonment in a penal institution for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

See *Master Stevedores' Ass'n v. Welsh*, 2 Daly, 1.

TITLE IX.

OF CRIMES AGAINST THE PERSON.

- CHAPTER I. Suicide.
II. Homicide.
III. Maiming.
IV. Kidnapping.
V. Assaults.
VI. Robbery.
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CHAPTER I.

SUICIDE.

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 176. Abetting an attempt at suicide.
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§ 172. Suicide defined.—Suicide is the intentional taking of one's own life.

§ 173. No forfeiture imposed for suicide.—Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

See § 710, *post*; 1 Bish. Crim. Law (7th ed.), §§ 259, 511, 615, 968; 2 *id.*, § 1187; *Com. v. Mink*, 128 Mass. 422; *R. v. Moody*, 6 Cox C. C. 468; *R. v. Burgess*, L. & C. 258; 9 Cox C. C. 247; *Darrow v. Family Fund Soc.*, 116 N. Y. 542; *Freeman v. National Benefit Soc.*, 5 N. Y. State Rep. 82.

§ 174. Attempting suicide.—A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or toward another person followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

§ 175. Aiding suicide.—A person who willfully, in any manner, advises, encourages, abets or assists another person in taking the latter's life, is guilty of manslaughter in the first degree.

If a person commits suicide in consequence of the advice of another so to do, the counselor is guilty of murder. *Com. v. Bowen*, 2 Wheeler Cr. Cas. 226; 18 Mass. 356; *Com. v. Mink*, 128 *id.* 422.

If two persons enter into an agreement to commit suicide together and the means employed to produce death prove fatal to one only the survivor is guilty of murder. *Regina v. Jessup*, 10 Crim. Law Mag. 862.

§ 176. Abetting an attempt at suicide.—A person who willfully, in any manner, encourages, advises, assists or abets another person in attempting to take the latter's life, is guilty of a felony.

See *Blackburn v. State*, 23 Ohio St. 146; *Com. v. Bowen*, 18 Mass. 356.

§ 177. **Incapacity of person aided no defense.**—It is not a defense to a prosecution under either of the last two sections, that a person who took, or attempted to take, his own life, was not a person deemed capable of committing crime.

§ 178. **Punishment of attempting suicide.**—Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.

Blackburn v. State, 23 Ohio St. 146; *Darrow v. Family Fund Society*, 42 Hun, 245; affirmed, 116 N. Y. 542.

This section presumes sanity. *Matter of Card*, 28 State Rep. 529. But see 40 Alb. L. J. 22; *Wolff v. Conn. Mut. Life*, 2 Flipp. 358.

In *Coyle v. Com.*, 100 Penn. St. 573; 2 Lawson Cr. Def. 441, it was held that an attempt at suicide raises no presumption of insanity.

That suicide *per se* proves nothing in relation to the mental state of the perpetrator is well settled. *Ordronaux*, Jud. Asp. of Ins., XXXVI; *Terry v. Life Ins. Co.*, 2 Bige. 81; affirmed, 15 Wall. 580; *Coverston v. Conn. Mut. Life Ins. Co.*, 4 Bige. 169; *Coffey v. Home Life Ins. Co.*, id. 224; *Phadenhauer v. Germania Life Ins. Co.*, 5 id. 508; *McClure v. Mut. Life Ins. Co.*, 4 id. 320.

CHAPTER II.

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205. Justifiable homicide.

§ 179. **Homicide defined.**—Homicide is the killing of one human being by the act, procurement or omission of another.

See *Fitzgerrold v. People*, 37 N. Y. 413; *People v. Greenvall*, 45 id. 523; *Buel v. People*, 78 id. 498, where the history of the statutes in reference to murder is given.

§ 180. **Different kinds of homicide.**—Homicide is either

1. Murder;
2. Manslaughter;
3. Excusable homicide; or,
4. Justifiable homicide.

The various statutory changes in the definition of the crime of murder have not abrogated the common-law counts in indictments for that crime. *People v. Giblin*, 114 N. Y. 196; 7 N. Y. Cr. Rep. 130.

§ 181. **What proof of death is required.**—No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt.

See Whart. Homicide (2d ed.), § 628; Whart. Crim. Law (7th ed.), § 745; Bish. Crim. Proc., §§ 1070, 1071; 78 Am. Dec. 248.

No person can be convicted of a felony unless the *corpus delicti* be first shown. *Plunket's Case*, 3 C. H. Rec. 137; *Ruloff v. People*, 18 N. Y. 179; reversing, 3 Park. 401; *People v. Wilson*, id. 199; *People v. Beckwith*, 108 N. Y. 63.

An uncorroborated confession made out of court, without other proof of the *corpus delicti*, will not justify a conviction. *People v. Hennessy*, 15 Wend. 147; *People v. Badgley*, 16 id. 53; *Matthews v. State*, 55 Ala. 187; 28 Am. Rep. 698; *State v. German*, 54 Mo. 526; 14 Am. Rep. 481.

The finding of the dead body is sufficient additional proof to warrant a conviction on a confession under § 395, Code Crim. Proc. *People v. Deacons*, 109 N. Y. 374; 16 N. E. Rep. 676, note.

The *corpus delicti* must be shown beyond a reasonable doubt. *People v. Schryver*, 42 N. Y. 1; 1 Am. Rep. 490; overruling, *Patterson v. People*, 46 Barb. 625; *Davis' Case*, 3 C. H. Rec. 45. *Contra*, *Lee v. State*, 76 Ga. 498.

The *corpus delicti* in homicide has two components, namely, death as the result, and the criminal agency of another as the cause. There must be direct

proof of the one or the other; but if one be proved by direct evidence, the other may be established by circumstances. *People v. Bennett*, 49 N. Y. 137.

This section applies to the trial of an indictment for murder, alleged to have been committed before the passage of the Penal Code, but tried thereafter. *People v. Beckwith*, 108 N. Y. 68; 7 N. Y. Cr. Rep. 146.

This section does not require direct proof of the identity of the victim, but only of the death. Identity is not included in the *corpus delicti* and is left open to circumstantial evidence. *People v. Palmer*, 109 N. Y. 110; reversing 46 Hun, 479.

The death having been alleged to be due to a wound inflicted by a bullet, it is immaterial whether this was the direct or mediate cause of death. *People v. Miniaci*, 12 State Rep. 720.

Sufficiency of "direct proof." *People v. Beckwith*, 108 N. Y. 68.

Evidence of a coroner and a doctor, that the body of the deceased was taken to the morgue, where an inquest was held, and stating his name, is admissible to prove the fact of death. *State v. Moran* (Oreg.), 14 Pac. Rep. 419.

§ 182. Common-law petit treason is homicide.—The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished; and those homicides are punishable, when not justifiable or excusable, as prescribed by this Code.

§ 183. Murder in first degree defined.—The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed, either

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or,
2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or,
3. Without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,
4. When perpetrated in committing the crime of arson in the first degree.

All homicide is presumed to be malicious until the contrary appears. *People v. Conroy*, 97 N. Y. 62; *People v. McLeod*, 1 Hill, 377; *People v. Kirby*, 2 Park. 28; *People v. Lamb*, 2 Abb. Pr. (N. S.) 148.

Prosecution must show grade of offense. *Stokes v. People*, 58 N. Y. 164.

If indictment contains a plain and concise statement of the act constituting the crime, and the proof as to the manner in which it was perpetrated, brings it within one of the statutory definitions of murder in the first degree, the requirements of the law are sufficiently met. *People v. Giblin*, 115 N. Y. 198.

On the trial of an indictment for murder, after A., who had witnessed the homicide, had testified to the circumstances attending it, and had shown in his testimony a disposition to favor the prisoner, the district attorney, for the purpose of refreshing his recollection, asked him if he had not previously testified to certain other facts specified; A. admitted that he had, and upon being asked if it was true, answered that it was. *Held*, that the method pursued to refresh the witness' recollection was proper. *People v. Kelly*, 113 N. Y. 647.

On the trial of an indictment for murder, a witness for the people, in giving a conversation had with the prisoner at the jail, will not be allowed on cross-examination to state a prior declaration not claimed to be part of the conversation already given. *Moett v. People*, 85 N. Y. 373; 23 Hun, 60.

Evidence that the prisoner was unmoved at the murder of his wife is competent evidence against him on his trial as her murderer. *Greenfield v. People*, 85 N. Y. 75; 39 Am. Rep. 636.

The reputation of the person killed for quarrelsomeness and bad temper may be shown, and that he was the assailant. *Abbott v. People*, 86 N. Y. 460; *People v. Lamb*, 2 Abb. Pr. (N. S.) 148, 154.

As to use of photographs as evidence, see 81 Cent. L. J. 414; 12 Crim. Law Mag. 600; *People v. Jackson*, 111 N. Y. 362; *People v. Smith*, 131 id. 579.

In *People v. Carlton*, 115 N. Y. 618, the court refused to charge that it was the duty of an officer to give notice of an intention to make an arrest, before using or attempting to use violence, and if without giving such notice the deceased, a police officer, struck, or attempted to strike, defendant, or to take him into custody, the defendant had a right to resist, and if in so doing he killed the officer, he could not be convicted of murder in the first degree; *held*, no error; that in the circumstances the homicide was neither justifiable nor excusable, and if deliberately and designedly committed was murder in first degree.

Subdiv. 1. While there must be deliberation as well as premeditation, if the killing is not the instant effect of impulse, if there is any hesitation or doubt to overcome, a choice made as the result of thought, however short the struggle, it is sufficient to characterize the crime. *Leighton v. People*, 88 N. Y. 117; 10 Abb. N. C. 261; *People v. Walworth*, 4 N. Y. Cr. Rep. 355, 360; *People v. Beckwith*, 103 N. Y. 368; 103 id. 67; *People v. Brunt*, 11 N. Y. State Rep. 60; 108 N. Y. 656; *People v. Majone*, 91 id. 211; 12 Abb. N. C. 187; *People v. Clark*, 7 N. Y. 385; *People v. Druse*, 5 N. Y. Cr. Rep. 11; *People v. Clark*, 2 Edm. Sel. Cas. 273; *People v. Sullivan*, id. 277.

In *People v. Hawkins*, 109 N. Y. 408, the court in defining "deliberation" charged: "All that the law requires is this, that there should be some reflection and some thought that precedes the blow. If there is thought, if there is reflection on the act, and if there is a choice and a determination as the result of these mental actions then there is sufficient deliberation within the law;" *held*, no error.

What evidence of premeditation and deliberation must be given to authorize submission of question to jury, see *People v. Conroy*, 97 N. Y. 62; *People v. Brunt*, 11 State Rep. 60; *People v. Deacons*, 109 N. Y. 373-379; *People v. Cornetti*, 92 id. 85; *People v. Divine*, 1 Edm. Sel. Cas. 594.

When it appears that the prisoner had time, during the dispute which resulted in the killing, not only to form the purpose in his mind to take the

life of his victim, but to announce to him that intention before carrying it into effect, it is sufficient to bring it within the rule requiring premeditation and deliberation. *People v. Kiernan*, 4 N. Y. Cr. Rep. 88; 101 N. Y. 618.

When evidence insufficient to sustain verdict, see *People v. Mangano*, 29 Hun, 259; 1 N. Y. Cr. Rep. 211.

Evidence considered and held sufficient to sustain verdict. *People v. Lewis*, 7 N. Y. Cr. Rep. 140; *People v. Deacons*, 109 N. Y. 374; *People v. Beckwith*, 108 id. 360; *People v. Trezza*, 36 State Rep. 149.

Subdiv. 2. See *People v. Hayes*, 1 Edm. Sel. Cas. 582; *People v. Doyle*, 2 id. 258.

Subdiv. 3. The killing of any human being, while engaged in the commission of any felony, is murder in the first degree, whether the felony was committed upon, or effected by, any person, or concerned property only. *People v. Greenwall*, 115 N. Y. 583. See *Fitzgerrold v. People*, 37 id. 413.

Notwithstanding that the act which produced death was not intended to kill. *People v. Cole*, 2 N. Y. Cr. Rep. 109.

Where the evidence showed that the death charged was caused by the act of defendant while he was attempting to escape from jail where he was confined upon a charge of felony, it tended to establish that the death occurred while defendant was attempting to commit a felony, he was guilty of murder, first degree. *People v. Johnson*, 110 N. Y. 135.

Whether, when death ensues in consequence of the commission or attempt to commit an assault under Penal Code, section 218, subd. 4, the assailant is guilty of murder in the first degree under above clause, *quero*. *People v. Sweeney*, 4 N. Y. Cr. Rep. 283, 284; 41 Hun, 840.

Indictment drawn in the common-law form sustained by proof of a killing in the perpetration of a felony will justify a conviction of murder in the first degree. *People v. Giblin*, 115 N. Y. 198.

The indictment need not state the circumstances constituting the offense. *People v. Giblin*, 115 N. Y. 198. But see *People v. Cole*, 2 N. Y. Cr. Rep. 112.

Intent to kill need not be alleged. *Cox v. People*, 80 N. Y. 502; *Ruloff v. People*, 45 id. 213; *Buel v. People*, 78 id. 492. It is sufficient to allege that it was done feloniously, with malice aforethought, and contrary to the form of the statute. *People v. Conroy*, 97 N. Y. 62.

Subdiv. 4. In *People v. Greenwall*, 115 N. Y. 524, Earl, J., says: "Why subdivision 4 was added cannot certainly be perceived. Its grammatical structure is such as to lead us to suppose that it was added by some one after the prior portions of the section had been drafted and completed by another. The draftsman of subdivision 4 clearly did not have a clear comprehension of the force and effect of the prior subdivision. It may have been intended to make the crime murder in the first degree in case a human being was burned to death in consequence of the crime of arson in the first degree."

§ 184. **Murder second degree.** — Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

Upon an indictment for murder in the common-law form the prisoner may be convicted of murder in the second degree. *Keefe v. People*, 40 N. Y. 348; *People v. Thompson*, 41 id. 1.

A prisoner cannot be convicted of murder in second degree except it be brought within statutory definition of that crime. *People v. Skeehan*, 49 Barb. 317.

To constitute murder in the second degree there must be an intent to do bodily harm to some one, though the act be immediately dangerous to others. *People v. Sheriff of Westchester*, 1 Park. 659; 10 N. Y. Leg. Obs. 278.

Upon the trial of an indictment for murder, where the evidence was conflicting, the court charged that the jury, if they believed the evidence offered by the people to be true, would be justified in finding the prisoner guilty of murder in the second degree. *Held*, error; that the existence of the intent to kill was a question to be determined by the jury from all the facts and circumstances. *McKenna v. People*, 81 N. Y. 360.

It is necessary under this statute that there should be an intent to kill; but the statute does not require that that intention should be the result of pre-deliberation; it may be formed upon the instant. *People v. Waiworth*, 4 N. Y. Cr. Rep. 373.

Evidence sufficient to sustain verdict. *People v. Donovan*, 8 N. Y. Cr. Rep. 79.

§ 185. Duel fought out of this state.— A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried and convicted in any county of this state.

See §§ 230, 240, *post*; Code Crim. Proc., § 133.

§ 186. Punishment of murder in first degree.— Murder in the first degree is punishable by death.

See Code Crim. Proc., §§ 491-509.

§ 187. Murder in second degree, how punished.— Murder in the second degree is punishable by imprisonment for the offender's natural life.

§ 188. Manslaughter defined.— In a case other than one of those specified in sections one hundred and eighty-three, one hundred and eighty-four and one hundred and eighty-five, homicide, not being justifiable or excusable, is manslaughter.

A homicide may only be classed as manslaughter when there is no design to kill. *People v. Beckwith*, 103 N. Y. 360.

Where there is an intent to take life, the crime is murder in the first degree unless there are circumstances that reduce the crime to manslaughter. *People v. Watts*, 50 How. 204.

Manslaughter may be committed by acts of a person who at the time had no intent to wound or inflict grievous bodily harm. *People v. Cole*, 2 N. Y. Cr. Rep. 113; *People v. McCarthy*, 110 N. Y. 316.

If one be killed, even accidentally, through the instrumentality of another, who is engaged in an unlawful act, the killing amounts to manslaughter. *Goodwin's Case*, 5 C. H. Rec. 52.

Any killing without design to cause death is manslaughter, unless justifiable or excusable. *People v. Austin*, 1 Park. 291; *People v. Hammill*, 2 Park. 223; *McCann v. People*, 6 id. 629.

Heat of passion reduces the grade of homicide to manslaughter. *Wilson v. People*, 4 Park. 619.

Death from fighting is manslaughter, though unintentional. *Goodwin's Case*, 6 C. H. Rec. 9; *Beal's Case*, id. 59; *Patterson's Case*, 3 id. 145; *People v. Sullivan*, 7 N. Y. 396.

Survivor in a prize fight is guilty of manslaughter. *People v. Tannan*, 4 Park. 514.

Where a mutual combat has been for the moment terminated, and a fatal blow is afterward struck, the question is, whether there has been a sufficient time to cool, not whether in point of fact he remained in the heat of anger. *People v. Sullivan*, 7 N. Y. 396.

If two persons be engaged in an affray, and life be unnecessarily taken by a third, who interferes to preserve the peace, it is manslaughter. *People v. Cole*, 4 Park. 35.

An unnecessary killing amounts to manslaughter where the act is only a trespass. *People v. Devine*, 1 Edm. Sel. Cas. 594.

Carelessly killing another by discharging a gun into the highway in nighttime is manslaughter. *People v. Fuller*, 2 Park. 16.

Killing of an adulterer by the husband, not in the act of adultery, is manslaughter. *People v. Ryan*, 2 Whart. C. C. 47.

Death by abortion is manslaughter, unless the child has quickened. *Evans v. People*, 49 N. Y. 86.

Under an indictment for manslaughter, the prisoner could be convicted of any degree of the offense. *People v. Butler*, 3 Park. 377.

§ 189. Manslaughter in the first degree.—Such homicide is manslaughter in the first degree, when committed without a design to effect death, either

1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or,

2. In the heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon.

One who causes the death of another by an unlawful assault may be convicted of manslaughter in first degree. *People v. McKeon*, 31 Hun, 449.

In order to constitute the crime of manslaughter in the first degree it must be shown that the prisoner was committing or attempting to commit some other offense than that of intentional violence upon the person killed. *People v. Butler*, 3 Park. 377; *Darry v. People*, 10 N. Y. 120; 2 Park. 606; *People v. Rector*, 19 Wend. 569.

Homicide in committing or attempting to commit a misdemeanor is manslaughter in the first degree. *People v. Rector*, 19 Wend. 569.

Where the killing is done in the heat of passion, while parties are engaged in a personal affray or otherwise. *People v. Sullivan*, 7 N. Y. 306; *Patterson's Case*, 8 C. H. Rec. 145; *People v. Cole*, 4 Park. 35; *People v. Johnson*, 2 id. 291; *People v. Hammill*, id. 223; *McCann v. People*, 6 id. 629; *People v. Sheriff, etc.*, 1 id. 659; *Buel v. People*, 78 N. Y. 492, 500; *Poster v. People*, 50 id. 598.

§ 190. Killing unborn quick child.—The willful killing of an unborn quick child, by any injury committed upon the person of the mother of such child, is manslaughter in the first degree.

See §§ 294-297 and notes.

To procure with the consent of the mother an abortion before quickening was not a crime at common law. *Mitchell v. Com.*, 78 Ky. 204; 89 Am. Rep. 229; *Com. v. Parker*, 9 Metc. 268; *Smith v. State*, 38 Me. 48.

Contra, *Mills v. Com.*, 18 Penn. St. 633.

A woman is "quick with child" from the period of conception and the commencement of gestation but is only "pregnant with a quick child" when the child has become quickened in the womb. *Evans v. People*, 49 N. Y. 89.

In an indictment the phrase "quick with child" is equivalent to "pregnant woman." *Eckhart v. People*, 83 N. Y. 462; 38 Am. Rep. 462.

§ 191. Killing unborn quick child by administering drugs, etc.—A person who provides supplies, or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree.

See *Lohman v. People*, 1 N. Y. 379; 2 Barb. 216; *People v. Stockham*, 1 Park. 424; *Evans v. People*, 49 N. Y. 86; *People v. McGonegal*, 17 N. Y. Supp. 148.

§ 192. Manslaughter in first degree, how punished.—Manslaughter in the first degree is punishable by imprisonment for a term not exceeding twenty years. [*In effect as amended May 17, 1892.*]

§ 193. **Manslaughter in second degree.**— Such homicide is manslaughter in the second degree, when committed without a design to effect death, either

1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to a crime; or

2. In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or,

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

See § 202, *post*; *People v. McCarthy*, 47 Hun, 491.

An indictment for manslaughter by culpable negligence giving the time of the commission of the offense, the place within the jurisdiction of the court and the circumstances there enumerated in the statute, *held* sufficient. *People v. Buddensieck*, 103 N. Y. 496; 5 N. Y. Cr. Rep. 69.

Where the employee of a corporation is indicted for manslaughter by culpable negligence causing death, it is no excuse that his negligence arose from his obedience to the instructions of his superior officer, which were in violation of the rules. *People v. Melius*, 1 N. Y. Cr. Rep. 89.

If upon a trial for murder there is evidence or inferences arising from the evidence, which might bring the case within the crime of manslaughter, it is the duty of the court to so charge the jury and to point out the particular facts and states of mind which the jury must find to have existed to bring the homicide within the crime. In such a case it is error to read to the jury the section of the Penal Code defining manslaughter preceding the reading by the remark that the court did not see the applicability of the sections to the case. *People v. Rego*, 36 Hun, 129; 3 N. Y. Cr. Rep. 275.

§ 194. **Women taking drugs, etc.** — A woman quick with child, who takes or uses, or submits to the use of any drug, medicine, or substance, or any instrument or other means with intent to produce her own miscarriage, unless the same is necessary to preserve her own life, or that of the child whereof she is pregnant, if the death of such child is thereby produced, is guilty of manslaughter in the second degree.

§ 195. **By negligent use of machinery.** — A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals, or property of any kind, intrusted to his care, or under his control, or by any unlawful, negligent or reck-

less act, not specified by or coming within the foregoing provisions of this chapter, or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree.

§ 196. **Owner of animals.** — If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, and not confined, kills a human being, who has taken all the precautions which the circumstances permitted, to avoid the animal, the owner is guilty of manslaughter in the second degree.

See § 640, subd. 11, *post*.

§ 197. **Killing by overloading passenger vessel.** — A person navigating a vessel for gain, who willfully or negligently receives so many passengers, or such a quantity of other lading on board the vessel that, by means thereof, the vessel sinks, or is upset or injured, and thereby a human being is drowned or otherwise killed, is guilty of manslaughter in the second degree.

Endangering human life by willfully or negligently overloading passenger vessel is misdemeanor; *post*, § 359.

§ 198. **Liability of persons in charge of steamboats.** — A person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness or gross neglect, or for the purpose of excelling any other boat in speed, creates or allows to be created, such an undue quantity of steam as to burst the boiler, or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

See §§ 360-362, *post*.

§ 199. **Liability of persons in charge of steam engines.** — An engineer or other person, having charge of a steam boiler, steam engine, or other apparatus for generating or applying steam, employed in a boat or railway, or in a manufactory, or in any mechanical works, who willfully, or from ignorance or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst the boiler, engine or apparatus, or to cause

any other accident, whereby the death of a human being is produced, is guilty of manslaughter in the second degree.

See §§ 360-362, 424, *post*.

§ 200. **Liability of physicians.** — A physician or surgeon, or person practicing as such, who, being in a state of intoxication, without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon, to another person, which produces the death of the latter, is guilty of manslaughter in the second degree.

§ 201. **Liability of persons making or keeping gunpowder contrary to law.** — A person who makes or keeps gunpowder or any other explosive substance within a city or village, in any quantity or manner prohibited by law, or by ordinance of the city or village, if any explosion thereof occurs, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

See §§ 389, 636, 645, *post*.

§ 202. **Punishment of manslaughter in second degree.** Manslaughter in the second degree is punishable by imprisonment for a term not exceeding fifteen years, or by a fine of not more than one thousand dollars, or by both. [*Amended; in effect May 17, 1892.*]

§ 203. **Homicide when excusable.** — Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

When killing of police officer attempting to arrest defendant not excusable. *People v. Carlton*, 115 N. Y. 618.

§ 204. **Justifiable homicide.** — Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance, either

1. In obedience to the judgment of a competent court; or,
2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or,
3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has

escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in lawfully suppressing a riot, or in lawfully preserving the peace.

When killing of policeman attempting to arrest defendant not justifiable. *People v. Carlton*, 115 N. Y. 618.

§ 205. Justifiable homicide. — Homicide is also justifiable when committed, either

1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

See *ante*, § 26; *People v. Walworth*, 4 N. Y. Cr. Rep. 378; *People v. Donaldson*, 2 Edm. Sel. Cas. 78; *People v. Downs*, 56 Hun, 11.

CHAPTER III.

MAIMING.

SECTION 206. Maiming defined; how punished.

207. Maiming one's self to escape performance of a duty.

208. Maiming one's self to obtain alms.

209. What injury may constitute maiming.

210. Subsequent recovery of injured person, when a defense.

§ 206. Maiming defined; how punished. — A person who willfully, with intent to commit a felony, or to injure, disfigure or disable, inflicts upon the person of another an injury which,

1. Seriously disfigures his person by any mutilation thereof; or,
 2. Destroys or disables any member or organ of his body; or,
 3. Seriously diminishes his physical vigor by the injury of any member or organ,

Is guilty of maiming, and is punishable by imprisonment for a term not exceeding fifteen years. The infliction of the injury is presumptive evidence of the intent. [*Amended; in effect May 17, 1892.*]

See *Foster v. People*, 50 N. Y. 598; *Godfrey v. People*, 68 id. 207; *Burke v. People*, 4 Hun, 481; *Tully v. People*, 67 N. Y. 15.

§ 207. **Maiming one's self to escape performance of a duty.** — A person who, with design to disable himself from performing a legal duty, existing or anticipated, inflicts upon himself an injury, whereby he is so disabled, is guilty of a felony.

§ 208. **Maiming one's self to obtain alms.** — A person who inflicts upon himself an injury, such as if inflicted upon another would constitute maiming, with intent to avail himself of such injury, in order to excite sympathy, or to obtain alms, or any charitable relief, is guilty of a felony.

§ 209. **What injury may constitute maiming.** — To constitute maiming, it is immaterial by what means or instrument, or in what manner the injury was inflicted.

§ 210. **Subsequent recovery of injured person, when a defense.** — Where it appears, upon a trial for maiming another person, that the person injured has, before the time of trial, so far recovered from the wound, that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming can be had; but the defendant may be convicted of assault in any degree.

CHAPTER IV.

KIDNAPPING.

SECTION 211. Kidnapping defined.

212. Indictment, where triable

213. Effect of consent of injured person.

214. Selling services of persons of color.

215. Removing from this state persons held to service in another state.

216. Penalty imposed on judicial officers.

§ 211. Kidnapping defined.—A person who willfully,

1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained against his will; or,

2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parent, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child; or,

3. Abducts, entices, or by force or fraud unlawfully takes, or carries away another, at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking, or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state, is guilty of kidnapping, and is punishable by imprisonment for not more than fifteen years.

Subdiv. 1. In *People v. DeLeon*, 109 N. Y. 228; 4 Am. St. Rep. 444; affirming 47 Hun, 308, defendant was indicted and convicted of the kidnapping of B., with intent to cause her to be taken out of the state and to be kept and detained against her will. The evidence showed that the defendant, under the false pretenses that employment had been secured for her as governess, in the family of one Madame De Blen, at Panama, induced said B. to take passage on a steamer for Aspinwall, for the purpose of engaging in that service. when, in truth and in fact, said De Blen was the keeper of a house of prostitution at Panama, for which the defendant acted as her procurer, and that his object and purpose in inducing the prosecutrix to go to Panama were that she should become an inmate of such house. *Held*, that there was sufficient evidence to support the conviction.

Procuring the intoxication of a sailor, with intent to take him on board ship without his consent, and taking him on board ship, is kidnapping; and it is immaterial whether the person charged with the offense did the acts in person, or caused them to be done. *Hadden v. People*, 25 N. Y. 373.

An arrest of a person within this state, by a private individual, without warrant, for the purpose of taking such person without the state, and followed by such abduction, constitutes a kidnapping under the act. *Mandeville v. Guernsey*, 51 Barb. 99.

Subdiv. 2. *People v. Navagh*, 4 N. Y. Cr. Rep. 295; 41 Hun, 188.

The process of inveigling or enticing may be the work of time. *Carpenter v. People*, 8 Barb. 608.

Mere persuasion without violence may amount to inveiglement. *Kauffman v. People*, 11 Hun, 82.

It is not necessary that force or ill-usage should be exercised to constitute kidnapping. *State v. Rollins*, 8 N. H. 550.

It is enough to show that the mind of the person taken was operated upon by falsely exciting fears, etc., and the age and condition of the person kidnapped should be considered. *Moody v. People*, 20 Ill. 315.

Where Italian children were induced to consent to come to America by being told of the "beautiful things of America," that they would have plenty of money, etc.; and thereupon such children came to America, *held*, that they had been inveigled. *United States v. Ancarola*, 1 Fed. Rep. 676; 17 Blatchf 423.

The intent is assumed from the act itself. *People v. Tinsdale*, 10 Abb. Pr. (N. S.) 874.

It need not be averred or proven. *Nutt v. State*, 19 Tex. 840; *Manes v. State*, 20 id. 38; *Com. v. Brooks*, 9 Gray, 299.

When an act is in itself illegal the law presumes evil intention. *State v. Council*, 1 Overton, 305; *People v. Brunnell*, 18 How. Pr. 443.

§ 212. Indictment, where triable.— An indictment for kidnapping may be tried either in the county in which the offense was committed, or in any county through or in which the person kidnapped or confined was taken or kept, while under confinement or restraint.

§ 213. Effect of consent of injured person.— Upon a trial for a violation of this chapter, the consent thereto of the person kidnapped or confined shall not be a defense, unless it appear satisfactorily to the jury that such person was above the age of twelve years, and that the consent was not extorted by threats or duress.

This section has no application to cases of "inveiglement." *People v. DeLeon*, 47 Hun, 812; 109 N. Y. 228.

Consent produced by fraud is no consent. *People v. DeLeon*, 47 Hun, 813.

§ 214. Selling services of person of color.— A person who, within this state or elsewhere, sells or in any manner transfers, for any term, the services or labor of any person who has been forcibly taken, inveigled or kidnapped in or from this state, is punishable by imprisonment in a state prison not exceeding ten years.

§ 215. Removing from this state persons held to service in another state.— A person claiming that he or another is entitled to the services of a person alleged to be held to labor or service in a state or territory of the United States who, except as

authorized by special statute, takes or removes, or willfully does any act tending towards removing from this state any such person, is guilty of felony, punishable by imprisonment in the state prison not exceeding ten years, and by a penalty of five hundred dollars, recoverable in a civil action by the party aggrieved.

§ 216. **Penalty imposed on judicial officers.**— A judge, or other public officer of this state who grants or issues any warrant, certificate or other process, in any proceeding for the removal from this state of any person claimed as held to labor or service in a state or territory of the United States, except in pursuance of the statute of this state, is guilty of a misdemeanor; and in addition to the punishment therefor prescribed by law, he forfeits five hundred dollars to the party aggrieved, recoverable in a civil action.

CHAPTER V.

ASSAULTS.

SECTION 217. Assault in first degree defined.

218. Assault in second degree.

219. Assault in third degree.

220. Assault in first degree, how punished.

221. Assault in second degree.

222. Assault in third degree.

223. Use of force or violence, declared not unlawful, etc.

§ 217. **Assault in first degree defined.**— A person who, with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another,

1. Assaults another with a loaded fire arm, or any other deadly weapon, or by any other means or force likely to produce death; or,

2. Administers to, or causes to be administered to or taken by another, poison, or any other destructive or noxious thing, so as to endanger the life of such other,

Is guilty of assault in the first degree.

Subdiv. 1. Sufficiency of allegations in indictment. *People v. Whedon*, 2 N. Y. Cr. Rep. 318.

This subdivision conforms to the preceding state of the law. *People v. Ryan*, 7 N. Y. Cr. Rep. 451.

To constitute an assault with intent to kill, two things must concur — an assault and a specific intent to kill. *Trevino v. State*, 27 Tex. App. 373; *State v. Keasting*, 74 Iowa, 528.

A person who attacks another with an unlawful weapon may be convicted of assault with intent to kill, if the crime would have been a murder had death ensued. *O'Blennis' Case*, 1 C. H. Rec. 117.

The intent to kill may be inferred from all the circumstances. *Hagaman's Case*, 3 City Hall Rec. 78; *People v. Vinegar*, 2 Park. 224; *Lanahan v. People*, 8 Hun, 164; *People v. Shaw*, 1 Park. 327; *Foster v. People*, 50 N. Y. 598, 603; *O'Leary v. People*, 18 How. 187, 193.

Evidence of assaults on others, committed after the one for which defendant is on trial, is inadmissible to show intent. *People v. Gibbs*, 1 N. Y. Cr. Rep. 473.

Defendant may testify that he had no angry feelings toward a person assaulted at the time of assault, where his angry manner and words have already been shown. *People v. Odell*, 14 Week. Dig. 403.

A pistol is a "fire-arm" within the meaning of this section. *People v. Whedon*, 2 N. Y. Cr. Rep. 320.

A "deadly weapon" is not exclusively one designed to take life or inflict bodily injury. When not of this character the question is one of fact. *Blige v. State*, 20 Fla. 742; 51 Am. Rep. 628; *People v. Cavanaugh*, 62 How. 187.

As to what are and what are not deadly weapons, see 1 Am. and Eng. Encyc. of Law, 817.

A blow with the handle of a pitchfork used like a club is not an assault with a "sharp and dangerous weapon." *Filkins v. People*, 69 N. Y. 101; 25 Am. Rep. 143.

The trial court is justified in assuming that a revolver is a dangerous weapon. *People v. Carlton*, 115 N. Y. 624.

Where the crime was designated in the indictment as assault in the second degree, and the facts alleged constituted assault in the first degree, *held*, good as an indictment for assault in the first degree, and sufficient to sustain a conviction for assault in the second degree. *People v. Sullivan*, 4 N. Y. Cr. Rep. 197.

In *People v. Ryan*, 55 Hun, 214; 7 N. Y. Cr. Rep. 450, the indictment contained two counts, charging defendant, first, with making an assault with a loaded pistol and shooting it off with intent to kill; and second, with making an assault with an instrument likely to produce grievous bodily harm. Defendant was convicted under the first count. The court declined to charge that if the jury came to the conclusion that the only time the pistol was aimed at the complainant was when it snapped and failed to go off, they could not convict for an assault in the first or second degree. *Held*, no error. See *People v. Connor*, 53 Hun, 353.

The court refused to permit complainant to answer whether he believed that, at the time when defendant made the threat to kill him, he intended to carry it out. *Held*, that the question being what defendant did and intended and not what the witness believed, the ruling was proper. *People v. Ryan*, 55 Hun, 214.

On the trial of *People v. Dartmore*, 48 Hun, 822, it was proved that the defendant fired three shots from a pistol at complainant; the first ball pene-

trated her cheek, the others striking metallic buttons in her dress; the shooting was admitted; but it was claimed to have been done in self-defense. *Held*, that the court properly refused to charge that the jury might convict of an attempt at an assault in the first, second or third degree.

In *People v. Johnson*, 9 Week. Dig. 384, the defendant, during an altercation, pointed a revolver at the complainant, and said: "If you come near me I will shoot you." *Held*, not an assault.

Pointing a loaded gun at another and threatening to shoot is an assault. *People v. Morehouse*, 25 State Rep. 294; *Com. v. McLaughlin*, 5 Allen, 507.

Presenting an uncocked revolver at a person is not sufficient to justify a conviction for attempting to discharge a pistol with intent to kill. *Mulligan v. People*, 5 Park. 105.

The aiming of a loaded pistol at a person, even though, upon an attempt to shoot, it snaps and fails to go off, is an assault in the first degree. *People v. Ryan*, 55 Hun, 214; 7 N. Y. Cr. Rep. 448.

Simply pointing a loaded gun at one is not an assault. *State v. Sears*, 86 Mo. 169. *Contra*, *State v. Taylor*, 20 Kans. 643.

Aiming an unloaded gun at a person within shooting distance, in such manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for criminal assault. *Chapman v. State*, 78 Ala. 463; 56 Am. Rep. 42. See, also, 1 Am. and Eng. Encyc. of Law, 815, and cases cited.

One who intending to kill A. assails B. in the dark, may be indicted for assault with intent to kill B. *M'Gehee v. State*, 62 Miss. 772; 52 Am. Rep. 209; *Dunaway v. People*, 110 Ill. 333; 51 Am. Rep. 686. *Contra*, *Lacefield v. State*, 34 Ark. 275; 36 Am. Rep. 8.

Subdiv. 2. In order to sustain conviction it must be shown that the life of the person was endangered by administering poison. *People v. Burgess*, 45 Hun, 157; 5 N. Y. Cr. Rep. 514.

§ 218. Assault in second degree.—A person who, under circumstances not amounting to the crime specified in the last section :

1. With intent to injure, unlawfully administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine, the use of which is dangerous to life or health ; or,

2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to, or causes to be administered to, or taken by another, chloroform, ether, laudanum, or any other intoxicating narcotic or anesthetic agent ; or,

3. Willfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon ; or,

4. Willfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm ; or,

5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person;

Is guilty of an assault in the second degree.

Is a felony. *People v. Sweeney*, 41 Hun, 340; 4 N. Y. Cr. Rep. 288; *People v. Cole*, 1 id. 112.

Where an indictment attempts to set forth an assault in the second degree but in fact only shows an assault in the third degree it is not demurrable. *People v. Cooper*, 3 N. Y. Cr. Rep. 118.

Subdiv. 3. One receives bodily harm in a legal sense when another touches his person against his will with physical force, intentionally hostile and aggressive, or projects such force against his person. *People v. Moore*, 50 Hun, 858.

Striking a person upon the head with a pistol, thereby inflicting severe injuries, is sufficient. *People v. Irving*, 2 N. Y. Cr. Rep. 47; 31 Hun, 615; affirmed on another point, 95 N. Y. 541.

The question whether such instrument was likely to produce "grievous bodily harm" is a question for the jury. *People v. Irving*, 31 Hun, 615.

Under an indictment charging assault with intent to do bodily harm with a sharp, dangerous weapon, a conviction of assault and battery cannot be had. *People v. Cavanaugh*, 62 How. 187.

A man who knows that he has gonorrhoea, and who by having connection with his wife, who does not know it, infects her, is not guilty of either "unlawfully and maliciously inflicting grievous bodily harm" or of "an assault occasioning actual bodily harm." *The Queen v. Clarence*, 22 Q. B. Div. 28.

Subdiv. 4. Whether, when death ensues in consequence of the commission or attempt to commit an assault under this subdivision, the assailant is guilty of murder in the first degree, *quere*. *People v. Sweeney*, 4 N. Y. Cr. Rep. 275; 41 Hun, 332. See *People v. Cole*, 2 N. Y. Cr. Rep. 112.

In *People v. Connor*, 53 Hun, 358, the act by which it was held the crime was completed, was in pointing a loaded pistol at the complainant who was within shooting distance. The indictment charged the act, and that it was done with intent to shoot off and discharge the pistol. Evidence was given from which such an intent could be inferred; *held*, that defendant was not entitled to a reversal of a judgment of conviction because of the additional allegation and the admission of the evidence given in support thereof, because the allegation was not required and defendant was not injured thereby. See *People v. Ryan*, 55 Hun, 214.

To sustain a conviction there must be shown an intent to do bodily harm, and also an intent to use, for that purpose, the weapon, other instrument, or thing referred to in the indictment and proof. *People v. Sullivan*, 4 N. Y. Cr. Rep. 194, 199. See *People v. Ryan*, 55 Hun, 214; *People v. Murray*, 54 id. 406; *Simpson v. State*, 59 Ala. 1; 31 Am. Rep. 1.

Subdiv. 5. Assault with intent to commit rape is accomplished by a felonious assault made upon the person of a female, with a pre-conceived intent to have sexual connection with her against her will, by the use of absolute force. *People v. Clark*, 3 N. Y. Cr. Rep. 280.

An attempt at sexual intercourse with a female, there being no violence, abandoned as soon as the female refused and resisted, is not an assault with intent to commit rape. *People v. Clark*, 3 N. Y. Cr. Rep. 280.

On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, on cross-examination, denies having voluntarily had connection with the prisoner prior to the alleged assault; evidence to contradict her, by proving such prior connection, is admissible on his behalf. *The Queen v. Riley*, 18 Q. B. Div. 481; 38 Eng. Rep. 537.

A prisoner may be convicted of an assault with intent to commit rape, upon a child under ten years of age, without evidence that he had actually touched her, on proof that he had decoyed her into a building for such purpose. *Hays v. People*, 1 Hill, 361.

The owner of personal property is liable to indictment for using force to prevent an officer from levying upon such property, by virtue of an execution against another person, where the officer acts in good faith, believing the property to be that of the execution debtor. *People v. Hall*, 2 N. Y. Cr. Rep. 134.

An allegation in such indictment that the person assaulted was in the execution of a "lawful process or mandate," is insufficient, the lawfulness being a mere conclusion which must be supported by facts set forth in the indictment, showing that the mandate or process was lawful. *People v. Cooper*, 3 N. Y. Cr. Rep. 117.

An indictment which does not allege that the assault was committed with the "intent" therein specified, does not contain sufficient to show an assault in the second degree. *People v. Cooper*, 3 N. Y. Cr. Rep. 117.

In *People v. Shanley*, 40 Hun, 477; 4 N. Y. Cr. Rep. 472, defendant was convicted for resisting a police officer, who attempted to arrest him for a misdemeanor not committed in the officer's presence. A warrant had been issued but the officer did not have it in his possession. The court declined to charge that it was the duty of the officer to disclose to defendant his authority and the process under which he was arrested, and charged that the warrant was in the constructive possession of the officer; *held*, error, for which the conviction was reversed and prisoner discharged. To same effect, *Codd v. Cabe*, 1 Exch. Div. 352; 18 Eng. Rep. 353, 358, note.

In *People v. Baker*, 89 N. Y. 460 (June, 1882), it was held that simply assaulting and resisting an officer is only assault and battery, and punishable as such.

§ 219. Assault in third degree.—A person who commits an assault, or an assault and battery, not such as is specified in the foregoing sections of this chapter, is guilty of assault in the third degree.

"An assault is an unsuccessful attempt to do harm to the person of another." Moak's Underhill Torts, 204.

An assault is an attempt with force and violence to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability of using actual violence against the person. *Hays v. People*, 1 Hill, 351; cited in *People v. Bransbey*, 32 N. Y. 535; *Ulark v. Downing*,

55 Vt. 259; 45 Am. Rep. 612. See, also, 1 Arch. Cr. Pl. & Pr. 907, n. (Pomeroy's ed.); 2 Bish. Crim. Law (2d ed.), § 82; Cal. Penal Code, § 240.

To constitute an assault the party must have the intent to strike, the ability to do so, and must make the attempt. *People v. Yelas*, 27 Cal. 630; *Smith v. State*, 39 Miss. 521, 525; *Gray v. State*, 63 Ala. 66, 73.

Physical touch not essential. *Com. v. Hagenlock*, 140 Mass. 125.

The slightest touching of another in a rude and angry manner is an assault and battery. *Spence v. Duffy*, 1 C. H. Rec. 39; *People v. Powers*, 1 Wheeler Cr. Cas. 405.

To pursue one and approach so near that danger is to be apprehended is an assault. *Faime's Case*, 5 C. H. Rec. 95.

It is not, however, an assault to point a cane at another in derision, without intent to strike him. *Goodwin's Case*, 6 C. H. Rec. 9.

The act of seizing the reins with which a person is driving in a sleigh, stopping his team and directing another person to turn the team in the opposite direction, which was immediately done, constitutes an assault upon the person driving. *People v. Moore*, 50 Hun, 356.

It may be an assault to strike a horse which another is driving. *Clark v. Downing*, 55 Vt. 259; 45 Am. Rep. 612. *Contra*, *Kirland v. State*, 43 Ind. 146; 18 Am. Rep. 386.

To attempt to run a cart against the wagon of another on the highway is an assault. *People v. Lee*, 1 Wheeler Cr. Cas. 364.

To sustain a conviction of an indecent assault upon young girls under twelve years, it is not necessary to show positive resistance on their part, but only that their persons were improperly interfered with. *People v. Court of Special Sessions*, 18 Hun, 330; *Rex v. McGavarrun*, 6 Cox C. C. 64; *Rex v. Case*, 4 id. 220.

The assent of a child even of tender years is a defense to a charge of indecent assault. *People v. Persons*, 2 N. Y. Cr. Rep. 114; *Rex v. Cockburn*, 3 Cox C. C. 543. To same effect. *Reg. v. Wollaston*, 12 Cox Cr. Cas. 180; 2 Eng. Rep. 234.

The law recognizes a distinction between mere submission and positive consent. *The Queen v. Lock*, L. R., 3 Cr. Cas. Res. 10; 4 Eng. Rep. 512.

"The least touching of another's person hostilely or against his will is a battery." Moak's Underhill Torts, 207; *Rawlings v. Still*, 3 M. & W. 28.

An accidental blow not. *Corning v. Corning*, 6 N. Y. 97.

Nor merely touching a person in order to engage his attention. *Coward v. Baddeley*, 28 L. J. Exch. 261.

To constitute the crime of assault and battery the assault must have been made with a criminal or vicious intent. *People v. Hale*, 18 Week. Dig. 213; 1 N. Y. Cr. Rep. 533.

Under an indictment for assault and battery, the prisoner can be convicted of an assault with a dangerous weapon with intent to do bodily harm. *Slattery v. People*, 1 Hun, 311.

A warrant of commitment which shows a conviction of "assault and battery," is a sufficient statement of a conviction of an assault in the third degree. *Matter of Gray*, 2 N. Y. Cr. Rep. 302, 307. See *People v. Maschke*, id. 168.

Form of indictment for assault and battery. *People v. Holcomb*, 4 Park. 656.

§ 220. **Assault in first degree, how punished.**— Assault in the first degree is punishable by imprisonment for a term not exceeding ten years. [*Amended; in effect May 17, 1892.*]

§ 221. **Assault in second degree.**— Assault in the second degree is punishable by imprisonment in a penitentiary or state prison for a term not exceeding five years, or by a fine of not more than one thousand dollars, or both. [*Amended; in effect May 17, 1892.*]

Is a felony. *People v. Terrell*, 33 State Rep. 369. See § 5, *ante*, and note.

§ 222. **Assault in third degree.**— Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars or both.

The punishment for this offense is identical with that provided for the punishment of misdemeanors, *ante*, § 15. *People, ex rel., v. Kelly*, 97 N. Y. 212; 3 N. Y. Cr. Rep. 432; 32 Hun, 540; *Matter of Bray*, 34 State Rep. 642.

Under this section and the provisions of the Code of Criminal Procedure, § 718, a judgment for a year's imprisonment and a fine and for imprisonment not exceeding "one day for each dollar of said fine" is not erroneous; as if there is any uncertainty in that part of the judgment relating to the fine, its validity can be tested by *habeas corpus* after the expiration of the imprisonment. *People v. Sutton*, 6 N. Y. Supp. 95.

§ 223. **Use of force or violence, declared not unlawful, etc.**—To use or attempt, or offer to use, force or violence upon or towards the person of another, is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

2. When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

3. When committed either by the party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense.

4. When committed by a parent or the authorized agent of any parent, or by any guardian, master or teacher, in the exercise of

a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree ;

5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety ;

6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.

See 21 Abb. N. C. 23, §§ 26, 208, 205, *ante*. 377. *post*; Code Crim. Proc., §§ 83, 168, 183.

Subdiv. 1. A peace officer may use only sufficient force to make the arrest or prevent the escape. *Conraddy v. People*, 5 Park. 234; *Hager v. Danforth*, 20 Barb. 16; *State v. Hull*, 34 Conn. 182; *Golden v. State*, 1 Rich. (N. S.) 292; *Com. v. Ruggles*, 6 Allen, 588. See, also, 1 Russ. Cr. (9th Am. ed.) 10.

A police officer when making an arrest may repel force with force, but he must not exceed the necessity of the case. *Com v. Max*, 8 Phila. 423; *People v. Bush*, 1 Wheeler Cr. Cas. 137, 139, note; *Clements v. State*, 60 Ala. 117; *Reneau v. State*, 2 Lea, 720.

Subdiv. 2. A party may use whatever force is necessary to arrest an offender against law, either with or without process. *People v. Adler*, 3 Park. 249; *People v. Wolven*, 7 N. Y. Leg. Obs. 89; *People v. McArdle*, 1 Wheel. C. C. 101.

Subdiv. 3. A party assailed, may use sufficient force to defend himself, even to the killing of his assailant. *Shorter v. People*, 2 N. Y. 193; *Patterson v. People*, 46 Barb. 625; *People v. Lamb*, 54 id. 342; 2 Keyes, 860; *People v. Austin*, 1 Park. 154; *People v. Cole*, 4 id. 35; *People v. Sullivan*, 7 N. Y. 396; *Boers v. People*, 63 id. 625.

A party may protect property in his lawful custody, even to killing a party attempting a felony. *Ruloff v. People*, 45 N. Y. 213; 5 Lans. 261; 11 Abb. (N. S.) 245; *Gyre v. Culver*, 47 Barb. 592; *Carey v. People*, 45 id. 262; *Harrington v. People*, 6 id. 607.

Even a trespasser may defend himself from wanton and unlawful violence. *People v. Gulick*, Hill & Den. Sup. 229; Lalor, 229.

Subdiv. 4. A parent may exercise such wholesome and proper restraint over a child as he deems right and proper, and may use sufficient force for that purpose. *Hernandez v. Carnobeli*, 10 How. Pr. 433; 4 Duer, 642.

So may a master in case of a servant. *People v. Shifflein*, 1 Wheeler Cr. Cas. 512; *People v. Phillips*, id. 155.

A master has no implied authority to whip a minor servant hired to him by his father. *Cooper v. State*, 8 Baxt. 324; 35 Am. Rep. 704.

A scholar may be punished for refractory conduct, and the teacher is not liable therefor if the chastisement was, in the circumstances, reasonable. *State v. Miener*, 45 Iowa, 248; 24 Am. Rep. 769; *State v. Pendergrass*, 2 Dev. & Batt. 365; *Morris' Case*, 1 City Hall Rec. 52; *Starr v. Litchfield*, 40 Barb. 541; *State v. Burton*, 45 Wis. 150; 18 Am. Law Reg. (N. S.) 233, 238, note.

The legal presumption will be that the punishment was proper; and to warrant a conviction, that presumption must be rebutted by showing that the punishment was excessive or without any proper cause. *Anderson v. State*, 3 Head (Tenn.), 455; *Van Vactor v. State*, 113 Ind. 276.

And whether the punishment was excessive or without just cause is a question of fact for the jury. *Com. v. Randall*, 4 Gray, 36.

In *Lander v. Seaver*, 32 Vt. 114; 76 Am. Dec. 163, the court says: "A school-master has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining what is a reasonable punishment various considerations must be regarded; the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. Among reasonable persons, much difference prevails as to the circumstances which will justify the infliction of punishment and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has, by being on the spot, to know all the circumstances, the manner, look, tone, gestures and language of the offender — which are not always easily described — and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by the way of protecting him in the exercise of his discretion. Especially should he have this indulgence when he appears to have acted from good motives, and not from anger and malice. Hence, the teacher is not to be held liable on the ground of the excess of punishment, unless the punishment is clearly excessive and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master would be liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive. But if there be any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt."

In *Hutton v. State*, 23 Tex. Ct. App. 336, it was held that a school teacher might lawfully chastise a pupil for fighting, out of school hours and away from the school-house, against a rule of the school. This agrees with *Deakins v. Goss*, 85 Mo. 485; 55 Am. Rep. 387.

If the teacher's punishment of a pupil be proper, the parent of the pupil is liable if, on account thereof, he assault the master. *Morris' Case*, 1 City Hall Rec. 52.

A girl fifteen years old living with her elder brother and being supported by him is subject to moderate restraint and correction at his hands. *Snowden v. State*, 12 Tex. Ct. App. 105; 41 Am. Rep. 667.

Subdiv. 5. When a passenger on a train refuses to pay his fare, the conductor may use sufficient force to eject him. *People v. Gibson*, 3 Park. 234; *Hibbard v. N. Y., etc., R. Co.*, 15 N. Y. 455; *Higgins v. Wateroliet, etc., R. Co.*, 46 id. 23; *Steamboat Co. v. Brockett*, 121 U. S. 637; *Pease v. Railroad Co.*, 101 N. Y. 370-71.

The conductor, however, must eject the passenger in a manner consistent with his safety. *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343. See, also, *Priest v. Railroad Co.*, 10 Abb. (N. S.) 60; 40 How. 456.

CHAPTER VI.

ROBBERY.

SECTION 224. Robbery defined.

225. How force or fear must be employed.

226. Degree of force immaterial.

227. Taking property secretly not robbery.

228. Robbery in first degree.

229. Robbery in second degree.

230. Robbery in third degree.

231. Punishment of robbery in first degree.

232. Punishment of robbery in second degree.

233. Punishment of robbery in third degree.

§ 224. Robbery defined. — Robbery is the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of any one in his company at the time of the robbery.

See *People v. O'Neil*, 6 N. Y. Cr. Rep. 226; *People v. Rose*, 52 Hun, 83.

"Robbery is larceny committed by violence from the person of one put in fear." 2 Bish. Crim. Law (7th ed.), § 1157.

"The felonious and forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Bl. Com. 242. See, also, *Bloomer v. People*, 1 Abb. Ct. App. Dec. 146.

As to robbery at common law, see 1 Whart. Crim. Law (8th ed.), § 846; *Rex v. Cannon*, R. & R. 146; 1 Hale, 533; *State v. Gorham*, 55 N. H. 152; *Com. v. Humphrey*, 7 Mass. 242; *Rex v. Reane*, 2 East P. C. 734; *Com. v. Humphreys*,

7 Mass. 242; *Long v. State*, 12 Ga. 293; *Bussey v. State*, 71 id. 100; 51 Am. Rep. 256.

Force or violence in depriving a man of his property is an essential ingredient of robbery. *Plato's Case*, 2 C. H. Rec. 31; *Mahoney v. People*, 3 Hun, 202; 5 Th. & C. 329.

It is robbery to extort personal property from another by means of threats of an unfounded charge, known to the prisoner to be groundless. *People v. McDaniels*, 1 Park. 198.

To snatch an article from the person of another, not robbery. *Anderson's Case*, 1 C. H. Rec. 168; *McCooley v. People*, 5 Park. 299; *People v. Hull*, 6 id. 642; *State v. Sommers*, 12 Mo. App. 374. But see *Evans v. State*, 80 Ala. 4.

The complainant was fraudulently induced by two confederates to expose some money in his hand; one of them then snatched it from him and ran away, while the other held him so that he should not pursue, and a struggle between them ensued. *Held*, that this did not constitute robbery. *Shinn v. State*, 64 Ind. 18; 31 Am. Rep. 110.

What circumstances sufficient to prove the *corpus delicti* on a trial for robbery. *Bloomer v. People*, 3 Keyes, 9; 1 Abb. Dec. 146.

The question of felonious intent is for the jury. *People v. Hall*, 6 Park. 642; *People v. McGinty*, 24 Hun, 62; *Hope v. People*, 88 N. Y. 426; 38 Am. Rep. 460.

Under an indictment for robbery, the jury may convict of larceny from the person or for an assault and battery. *Murphy v. People*, 3 Hun, 114; 5 Th. & C. 302.

What is a sufficient indictment. *Quinlan v. People*, 6 Park. 9.

Defendant, by means of threats of personal violence and menaces, compelled J. S. to pay to him money which defendant believed to be justly due to him from J. S. *Held*, not to constitute robbery. *State v. Hollywood*, 41 Iowa, 200; 20 Am. Rep. 586.

It is not necessary, in order to constitute robbery, that it shall be done in the immediate view of the person robbed. And where the victim is bound in one room and is frightened into telling the robber where the property is to be found in another room, and it is found and taken, the robbery is complete. *State v. Calhoun*, 72 Iowa, 432; 34 N. W. Rep. 194.

The property may be laid as belonging either to the actual owner or to the person robbed. *Brooks v. People*, 49 N. Y. 436; 10 Am. Rep. 398.

An indictment for robbery of bank bills alleged the value of the bills but not their denomination; *held*, bad. *Arnold v. State*, 52 Ind. 281; 21 Am. Rep. 175.

§ 225. How force or fear must be employed. — To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape it does not constitute robbery.

See *People v. Foley*, 9 N. Y. State Rep. 84; *McCooley v. People*, 5 Park. 299; *Mahoney v. People*, 3 Hun, 202.

§ 226. **Degree of force immaterial.**—When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial.

See *People v. Foley*, 27 Week. Dig. 217; 9 N. Y. State Rep. 84; *People v. McGinty*, 24 Hun, 62; *Mahoney v. People*, 3 id. 202; 59 N. Y. 659.

§ 227. **Taking property secretly not robbery.**—The taking of property from the person of another is robbery, when it appears that although the taking was fully completed without his knowledge, such knowledge was prevented by the use of force or fear.

Secretly picking a pocket is not robbery; there must be a putting in fear. *Norris' Case*, 6 City Hall Rec. 86.

§ 228. **Robbery in first degree.**—An unlawful taking or compulsion, if accomplished by force or fear, in a case specified in the foregoing sections of this chapter, is robbery in the first degree, when committed by a person,

1. Being armed with a dangerous weapon ; or,
2. Being aided by an accomplice actually present ; or,
3. When the offender inflicts grievous bodily harm or injury upon the person from whose possession, or in whose presence, the property is taken, or upon the wife, husband, servant, child, or inmate of the family of such person, or any one in his company at the time, in order to accomplish the robbery.

See *People v. McInerney*, 5 N. Y. Cr. Rep. 48.

§ 229. **Robbery in second degree.**—Such unlawful taking or compulsion, when accomplished by force or fear, in a case specified in the foregoing sections of this chapter, but not under circumstances amounting to robbery in the first degree, is robbery in the second degree, when accomplished either

1. By the use of violence ; or,
2. By putting the person robbed in fear of immediate injury to his person or that of some one in his company.

See *People v. Holfelder*, 5 N. Y. Cr. Rep. 179.

§ 230. **Robbery in third degree.**—A person who robs, another, under circumstances not amounting to robbery in the first or second degree, is guilty of robbery in the third degree.

§ 231. **Punishment of robbery in first degree.**— Robbery in the first degree is punishable by imprisonment for a term not exceeding twenty years. [*Amended; in effect May 17, 1892.*]

§ 232. **Punishment of robbery in second degree.**— Robbery in the second degree is punishable by imprisonment for a term not exceeding fifteen years. [*Amended; in effect May 17, 1892.*]

§ 233. **Punishment of robbery in third degree.**— Robbery in the third degree is punishable by imprisonment for not more than ten years.

CHAPTER VII.

DUELS AND CHALLENGES.

SECTION 234. **Dueling defined and punished.**

235. Challenger, abettor, etc.

236. Challenge defined.

237. Attempts to induce a challenge.

238. Posting for not fighting.

239. Duel outside of state.

240. Where such person may be indicted and tried.

241. Witnesses.

§ 234. **Dueling defined and punished.**— A person who fights a duel or engages in any combat with another, with deadly weapons, by previous agreement, or upon a previous quarrel, although no death or wound ensues, is punishable by imprisonment for a term not exceeding ten years. A person convicted under this section is thereafter incapable of holding, or of being elected or appointed to any office, or place of trust or emolument, civil or military, within the state.

3 R. S. 962, §§ 1, 4; 2 R. S. (Edm.) 708, §§ 1, 4; § 458, *post*; 2 Whart. C. Law, § 1767; *Rex v. Langley*, 2 Ld. Raymond, 1029; *Com. v. Whitehead*, 2 Boston Law Rep. 148; *Angler v. People*, 34 Ill. 486; *Com. v. Hart*, 6 J. J. Marsh. 119; *State v. Perkins*, 6 Blackf. 20; see, also, 1 R. L., 1813, p. 499, § 19. Laws 1817, ch. 1; *Herriott v. State*, 1 McMullan, 126.

The act to suppress dueling, passed November 5, 1815, is constitutional, and a conviction and judgment of disqualification under it is therefore legal and valid. *Barber v. People*, 3 Cow. 636; 20 Johns. 457.

§ 235. **Challenger, abettor, etc.** — A person who challenges another to fight a duel, or who sends a written or verbal message purporting or intended to be a challenge to fight a duel, or an invitation to a combat with deadly weapons, or who accepts such a challenge or message, or who knowingly carries or delivers such a challenge or message, or who is present at the time appointed for such a duel or combat, or when such a duel or combat is fought, either as second, aid or surgeon, or who advises or abets, or gives any countenance or assistance to such a duel or combat upon previous agreement, is punishable by imprisonment for not more than seven years.

3 R. S., 962, § 2; 2 R. S. (Edm.), 708, § 2; Laws 1828, ch. 481, § 2; Laws 1818, 499, § 19; *Rea v. Langley*, 2 Ld. Raymond, 1029; *State v. Perkins*, 6 Blackf., 20.

§ 236. **Challenge defined.** — Any word, spoken or written, or any sign, uttered or made to any person, expressing or implying, or intended to express or imply, a desire, request, invitation or demand to fight a duel, or to meet for the purpose of fighting a duel, is deemed a challenge.

It is the province of the jury to determine whether the writing was intended as a challenge. *Wood's Case*, 3 C. H. Rec. 139. See, also, 459, *post*; and *State v. Perkins*, 6 Blackf. 20; *Com. v. Tibbs*, 1 Dana, 524.

§ 237. **Attempts to induce a challenge.** — A person guilty of sending or using to another any word or sign whatever, with intent to provoke or induce such person to give or receive a challenge to fight a duel, is guilty of a misdemeanor.

See *King v. Phillips*, 6 East, 464; *Rea v. Rice*, 3 id. 581.

§ 238. **Posting for not fighting.** — A person who posts or advertises another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who, in writing or in print, uses reproachful or contemptuous language to or concerning any one, for not sending or accepting a challenge to fight a duel, or for not fighting a duel, is guilty of a misdemeanor.

3 R. S., 972, § 19; 2 R. S. (Edm.), 716, § 20; *Vermont v. Davidson*, 80 Vt., 377.

§ 239. **Duel outside of state.** — A person who leaves this state with intent to elude any provision of this chapter, or to commit any act without the state, which is prohibited by this

chapter, or who being a resident of this state, does any act without this state, which would be punishable by the provisions of this chapter, if committed within this state, is guilty of the same offense, and subject to the same punishment, as if the act had been committed, or was to have been consummated within this state.

3 R. S., 963, § 5; 2 R. S. (Edm.), 706, § 5; *Id.*, 677, § 6; *Rea v. Williams*, 2 Comp., 506; see Code Crim. Proc., § 183; § 188, *ante*, § 461, *post*; *State v. Taylor*, 3 Brev., 243; *Harris v. State*, 58 Ga., 332; *Isely v. State*, 12 Ala., 276; Laws 1816, ch. 4, § 5.

§ 240. Where such person may be indicted and tried.—A person offending against any provision of the last section may be indicted and tried in any county within this state; but the person so offending may plead a former conviction or acquittal in another state or country for the same offense; and if such plea is admitted or established, it shall be a bar to further proceedings against him, for such offense.

See § 185, *ante*

§ 241. Witnesses.—A person offending against any provision of this chapter is a competent witness against any other person offending in the same transaction, and must not be excused from testifying or answering any question, upon an investigation or trial for an offense under this chapter, upon the ground that his testimony might tend to convict him of a crime. But evidence given by a person so testifying, cannot be received against him, in any criminal action or proceeding.

See § 712, *post*; Whart. Crim. Ev., § 698; 2 Whart. Crim. Law, § 1778; *Wood's Case*, 3 City Hall Rec. 139; *State v. Dupont*, 2 McCord, 334.

CHAPTER VIII.

LIBEL.

SECTION 242. Libel defined.

243. Libel a misdemeanor.

244. Malice presumed, defense to prosecution.

245. Publication defined.

246. Liability of editors and others.

247. Publishing a true report of public official proceedings.

SECTION 248. Qualification of last section.

249. Indictment against resident.

250. Indictment against non-resident.

251. Indictment; punishment restricted.

252. Indictment; power of court, place of trial.

253. Privileged communications.

254. Threatening to punish libel.

254a. Furnishing libelous information.

§ 242. **Libel defined.** — A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel.

See 2 Kent Com. 17; Cooley Torts, 193; 2 Bish. Crim. Law (7th ed.), § 907; Moak's Underhill Torts, 119; 23 Alb. L. J. 46; 3 id. 46; 35 Eng. Rep. 647; 3 Lawson Rights, Remedies and Practice, §§ 1266-1279; 4 Wait's Act. and Def. 281; *Bergman v. Jones*, 94 N. Y. 52; *Sumner v. Buel*, 12 Johns. 477; *Shelley v. Sun Printing Co.*, 38 Hun, 474; 109 N. Y. 611; *Com. v. Clapp*, 4 Mass. 168; *Barr v. Moore*, 87 Penn. St. 385; *State v. Smily*, 37 Ohio St. 30; 41 Am. Rep. 489; *White v. Nichols*, 3 How. (U. S.) 266; *Stewart v. Swift Specific Co.*, 76 Ga. 380; 2 Am. St. Rep. 40; *Carpenter v. Hammond*, 1 State Rep. 551.

A charge that a person at a time and place mentioned met the wife of another and "committed an abomination in the sight of the Lord" is not libelous *per se*. *People v. Isaacs*, 1 N. Y. Cr. Rep. 148.

The following publications have been held to be libelous:

That the plaintiff is about to commence a suit for libel, but that he will not bring it to trial in a particular county because he is known there. *Cooper v. Greeley*, 1 Den. 347.

Charging a maltster with using filthy water in brewing. *White v. Delavan*, 17 Wend. 49; *Turrill v. Dolloway*, id. 426; *Fidler v. Delavan*, 20 id. 51; *Ryckman v. Delavan*, 25 id. 186.

Charging a candidate with corruption. *Powers v. Dubois*, 17 Wend. 63.

Charging a senator with corrupt conduct as senator is actionable though his term of office had expired before its publication. *Cramer v. Riggs*, 17 Wend. 209.

Charging a politician with corruptly using money. *Weed v. Foster*, 11 Barb. 203.

Charging that a member of congress was a fawning sycophant, a misrepresentative in congress, and a groveling office-seeker, and that he abandoned his post in congress in pursuit of office. *Thomas v. Crowell*, 7 Johns. 264.

A charge of smuggling. *Stillwell v. Barter*, 19 Wend. 487.

Of blackmail. *Edsall v. Brooks*, 26 How. Pr. 426; 2 Robt. 29; 17 Abb. Pr. 221; *Robertson v. Bennett*, 44 N. Y. Super. 66; of swindling. *Williams v. Godkin*, 5 Daly, 499; of dishonesty. *Taylor v. Church*, 1 E. D. Smith, 279.

An imputation of poverty may be libelous, if so alleged as to excite nothing but ridicule. *Moffat v. Caldwell*, 3 Hun, 26.

An imputation of drunkenness. *Sanderson v. Caldwell*, 45 N. Y. 401; *Giles v. State*, 6 Ga. 276.

An imputation of insanity. *Perkins v. Mitchell*, 81 Barb. 465; *Southwick v. Stevens*, 10 Johns. 443.

A charge of kidnapping another and bringing him into slavery. *Nash v. Benedict*, 25 Wend. 645.

That a teller of a bank while acting in that capacity had become mentally deranged through overwork, and that while in such condition he had made injurious statements concerning the bank, which occasioned it trouble. *Moore v. Francis*, 121 N. Y. 199; 8 L. R. A. 214.

In *Reg. v. Adams*, 22 Q. B. Div. 66, defendant was tried and convicted on an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter of and concerning her, and of and concerning her character for virtue and modesty. The defendant having seen an advertisement for a situation inserted by the young woman in a newspaper, wrote and sent to her at the address given in the letter in question, which contained a proposal in plain terms that she should surrender her chastity to him for a sum of money. *Held*, that the conviction could be sustained, because, in all the circumstances, the defamatory letter might reasonably tend to provoke a breach of the peace.

A published statement that a married man is threatened with a breach of promise suit. *Morey v. Morning Journal Ass'n*, 123 N. Y. 207.

A false and malicious publication that one's house has been searched under legal process for stolen goods supposed to be secreted therein. *State v. Smily*, 87 Ohio St. 30; 41 Am. Rep. 487.

To publish of an attorney for a city that he abandoned his client's cause by resigning his office in the midst of a litigation brought on his advice to the detriment of his client. *Hetherington v. Sterry*, 28 Kans. 426; 42 Am. Rep. 169.

To charge a member of the bar as offering himself as a witness in order to divulge the secrets of his client is libelous. *Biggs v. Denniston*, 3 Johns. Cases, 198.

To publish of a druggist that he has made and sold a counterfeit medicine put up in counterfeit wrappers. *Steketee v. Kimm*, 48 Mich. 322.

A newspaper publication of the suicide of a man falsely charging in effect that it was induced by the exactness of his wife and by her fraudulent conduct in taking wages for her son which he had not earned. *Bradley v. Cramer*, 59 Wis. 309; 48 Am. Rep. 511.

Published words charging a wife with deserting her husband in his sickness. *Smith v. Smith*, 73 Mich. 445; 16 Am. St. 594; 8 L. R. A. 52.

The publication of a statement that persons employed in a certain department "have been dismissed for alleged thefts of leather belonging to the department," with a comment that "the rascals ought to feel thankful for getting off without more severe punishment," is libelous as amounting to a charge of theft. *Dwyer v. Fireman's Journal Co.*, 11 Daly, 248; *Ryer v. Fireman's Journal Co.*, id. 251.

Words employed in an alleged libel are to be construed by courts and juries in the plain and popular sense in which other people would naturally under-

stand them. *Folkard's Stark. Lib. and Slander*, § 155; *Moak's Underhill Torts*, 125; *Cooper v. Greeley*, 1 Den. 358; *More v. Bennett*, 48 N. Y. 475; *Wright v. Paige*, 36 Barb. 438; affirmed, 3 Trans. App. 134; *Rich v. Parrott*, 1 Cliff. 55; *Carroll v. White*, 33 Barb. 615.

The scope of the entire article is to be considered and such construction put upon its language as would be naturally given to it. *Spencer v. Southwick*, 11 Johns. 592; *Cooper v. Greeley*, 1 Den. 358; *More v. Bennett*, 48 N. Y. 475; *Bradley v. Oramer*, 59 Wis. 309; 48 Am. Rep. 513; *Williams v. Godkin*, 5 Daly, 499.

The publication of a libel is not an infamous crime. *People v. Parr*, 5 N. Y. Cr. Rep. 34.

§ 243. **Libel a misdemeanor.** — A person who publishes a libel is guilty of a misdemeanor.

§ 244. **Malice presumed; defense to prosecution.** — A publication having the tendency or effect, mentioned in section two hundred and forty-two, is to be deemed malicious, if no justification or excuse therefor is shown. The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public.

See Code Civ. Proc., §§ 535, 536.

The State Const., art. I, § 8, provides as follows: "In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

The general rule is that in the case of a libelous publication, the law implies malice. *Byam v. Collins*, 111 N. Y. 150; *Root v. King*, 7 Cow. 613; 4 Wend. 113; *Washburn v. Cook*, 3 Den. 110; *Hunt v. Bennett*, 19 N. Y. 176.

A petition for the removal of an official for malfeasance not libelous without direct proof of malice. *Thorn v. Blanchard*, 5 Johns. 508.

A charge made on mere rumor is no justification. *Powers v. Skinner*, 1 Wend. 451.

That an article published, was copied, is no defense. *Hotchkiss v. Oliphant*, 2 Hill, 510.

Nor that the author's name was given. *Dole v. Lyon*, 10 Johns. 447.

Truth must be established, and goes to the intent. *Rice v. Withers*, 9 Wend. 188; *People v. Tracy*, 2 Wheel. Cr. Cas. 358.

The motive must be justifiable. *Baldwin's Case*, 3 C. H. Rec. 61.

Mitigating circumstances must be pleaded in connection with a denial of malice. *Daly v. Byrne*, 1 Abb. N. C. 150.

Good motives and justifiable ends must be shown. *Bartholomy v. People*, 2 Hill, 248. See *Snyder v. Andrews*, 6 Barb. 43.

Justification in answer set up must be definite and certain. *Id.*

And must be as broad as the charge. *Skinner v. Powers*, 1 Wend. 451; *Stilwell v. Barter*, 19 id. 487; *Fidler v. Delavan*, 20 id. 57; *Cooper v. Barber*, 24 id. 105.

The question of good faith and belief in the truth of the statement is for the jury. *Brooks v. Harrison*, 91 N. Y. 89; *Hamilton v. Eno*, 81 id. 122.

§ 245. Publication defined. — To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself.

See 4 Wait's Act. and Def. 493; Moak's Underhill Torts, 127; 3 Lawson Rights, Remedies and Practice, § 1236.

Publication is not established by proof that defendant sold copies of the newspaper containing the libel without proof that anybody ever saw or read the libel in any of the papers so sold. *Prescott v. Tousey*, 50 N. Y. Super. 12.

The handing a printed pamphlet to the governor of a state upon an argument before him in favor of the passage of a bill awaiting his signature, by a person who had not prepared the pamphlet and did not know its contents, is not a publication. *Woods v. Wiman*, 47 Hun, 362; reversed, 122 N. Y. 445, but on other grounds.

Sending a letter to the plaintiff, sealed, is not a publication which will sustain a private suit. *Warnoch v. Mitchell*, 42 Fed. Rep'r, 428; 42 Alb. L. J. 409.

But is punishable as tending to a breach of the peace. *Barrow v. Levellin*, Hob. 62a; *Lyle v. Clason*, 1 Caines, 581.

A writer reading a libelous letter to a stranger before sending it, is a publication. *Snyder v. Andrews*, 6 Barb. 43; *Van Cleaf v. Lawrence*, 6 C. H. Rec. 41.

A libel published in another state not actionable here. *Trumbull v. Gibbons*, 3 C. H. Rec. 97.

It is a publication to send the libel to the wife of the person libeled. *Wenman v. Ash*, 13 C. B. 836; 22 Eng. Law & Eq. 509; *Snyder v. Andrews*, 6 Barb. 47; *Schenck v. Schenck*, 20 N. J. L. 208; *Sesler v. Montgomery*, 78 Cal. 486; 12 Am. St. Rep. 76; 28 Am. L. Reg. (N. S.) 271, note. See, also, Odgers Lib. and Sl. 152, 153. *Contra*, *Trumbull v. Gibbons*, 3 C. H. Rec. 97; *Wennhak v. Morgan*, 20 Q. B. Div. 635; 38 Eng. Rep. 682.

§ 246. Liability of editors and others. — Every editor, or proprietor of a book, newspaper or serial, and every manager of a partnership or incorporated association, by which a book, newspaper or serial is issued, is chargeable with the publication of any

matter contained in such book, newspaper or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication, and whose act was disavowed by him so soon as known.

See 19 Alb. L. J. 188, 208; 66 L. Times, 164; 64 id. 95; 68 id. 28, 48; 12 Irish L. Times, 83; 1 So. L. Rev. (N. S.) 238; *Ropke v. Brooklyn Daily Eagle*, 9 State Rep. 709; *Thomas v. Crowell*, 7 Johns. 264; *Fry v. Bennett*, 28 N. Y. 824; *Hunt v. Bennett*, 19 id. 175; *Sunderlin v. Bradstreet*, 46 id. 188; *Purdy v. Rochester Printing Co.*, 96 id. 373; *Andres v. Wells*, 7 Johns. 260; *Shelley v. Sun Printing Ass'n*, 48 Hun, 474; 109 N. Y. 611; *Press Co. v. Stewart*, 119 Penn. St. 584; *Huff v. Bennett*, 4 Sandf. 120; *Bruce v. Reed*, 104 Penn. St. 408; 49 Am. Rep. 586; *Neeb v. Hope*, 4 East. Rep. 129.

§ 247. Publishing a true report of public official proceedings.—A prosecution for libel cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein, of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report.

See *Sanford v. Bennett*, 24 N. Y. 20; *Ackerman v. Jones*, 37 N. Y. Super. 42; *Thomas v. Crowell*, 7 Johns. 264; *Steele v. Southwick*, 9 id. 214; *Stanley v. Webb*, 4 Sandf. 221; *Edsall v. Brooks*, 2 Robt. 29; *McCabe v. Cauldwell*, 18 Abb. Pr. 377.

§ 248. Qualification of last section.—The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any other person concerned in the publication; or in the report of any thing said or done at the time and place of the public and official proceeding, which was not a part thereof.

See *Stanley v. Webb*, 4 Sandf. 221.

§ 249. Indictment against resident.—An indictment for a libel, contained in a newspaper published within this state, against a resident thereof, may be found either in the county where the paper was published, or in the county where the person libeled resided when the offense was committed. In the latter case the defendant is entitled to an order of the Supreme Court, directing

the indictment against him to be tried in the county in which the paper was printed and published, upon compliance with the following conditions :

1. He must apply for the order within thirty days after being committed upon, or giving bail to answer, the indictment ;

2. He must execute a bond to the complainant, with two sufficient sureties, approved by the judge hearing his application, in a penal sum fixed by the judge, not less than two hundred and fifty nor more than one thousand dollars, conditioned for the payment, in case the defendant is convicted, of all the complainant's reasonable expenses in going to and from his place of residence and the place of trial, and in attendance upon the trial ;

3. He must, within ten days after the granting of the order, file the order and deposit the bond with the clerk of the county in which the indictment is pending.

§ 250. Indictment against non-resident. — An indictment for a libel published against a person not a resident of this state, must be found and tried in the county where the paper containing the libel purports upon its face to be published ; or, if no county is indicated upon the face of the paper, in any county where the paper was circulated.

See Code Crim. Proc., § 138; *Trumbull v. Gibbons*, 3 C. H., Rec. 397.

§ 251. Indictment ; punishment restricted. — A person cannot be indicted or tried for the publication of the same libel, against the same person, in more than one county.

§ 252. Indictment ; power of court, place of trial. — Nothing contained in this chapter shall be construed to abridge, or in any manner affect, the power of a competent court, to change the place of trial of an indictment for libel, in the same manner as may lawfully be done, in respect to any other indictment.

§ 253. Privileged communications. — A communication made to a person entitled to, or interested in the communication, by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication.

See 28 Am. L. Reg. (N. S.) 1; 35 Eng. Rep. 264; 15 Am. Dec. 232.

Whether a libelous communication is privileged is a question of law for the court. *Byam v. Collins*, 111 N. Y. 150; *Hamilton v. Eno*, 81 id. 116.

In *Hamilton v. Eno*, 81 N. Y. 124, the court say: "The occasion that makes a communication privileged is when one has an interest in a matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom a like propriety attaches to hear the utterance. *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Klinck v. Colby*, 46 id. 427; *Sunderlin v. Bradstreet*, id. 191. And in a qualified way the occasion exists when there has been put forth a publication of general public interest, or the publication is in itself one to which the public interest has been invited."

In *Hamilton v. Eno*, 81 N. Y. 126, the court say: "It is the law of this state that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive and in the exercise of a political right (*Lewis v. Few*, 5 Johns. 1), and though the libel relate to a public act of the candidate in his official place. *Root v. King*, 7 Cow. 618; affirmed, 4 Wend. 113. It cannot be different when the charge is against one holding an office. See *Edsall v. Brooks*, 17 Abb. Pr. 221. So it seems to be in other states. *Com. v. Clapp*, 4 Mass. 163; *Curtis v. Mussey*, 6 Gray, 261; *Seely v. Blair*, Wright (Ohio), 358, 683; *Brewer v. Weakley*, 2 Overton (Tenn.), 99; *Mayrant v. Richardson*, 1 N. & McC. (S. Car.) 347; Tiedeman Police Power, 52. See, also, 86 Am. Dec. 88; 58 Am. Rep. 635; 57 id. 223; 24 Am. L. Reg. (N. S.) 516, 640, 645; *Briggs v. Garrett*, 111 Penn. St. 404; 83 Alb. L. J. 211; 56 Am. Rep. 274; distinguishing *Hamilton v. Eno*, 81 N. Y. 126.

Where a communication is privileged on its face, plaintiff must show both malice and want of probable cause. *Streety v. Wood*, 15 Barb. 105.

Legislative or judicial proceedings are privileged. *Kelly v. Taintor*, 48 How. 270; *Thorn v. Blanchard*, 5 Johns. 508.

A memorial addressed to the board of excise against granting license to a particular individual, privileged. *Vandersee v. McGregor*, 12 Wend. 545.

A charge against one member by another, in a matter which the society can investigate, is privileged. *Streety v. Wood*, 15 Barb. 105.

A charge of violation of official duty, made to proper authorities, is privileged. *Van Wyck v. Aspinwall*, 17 N. Y. 190; 4 Duer, 268.

Complaint to a fire marshal as to origin of fire, privileged. *Newfield v. Coperman*, 47 How. 87; 15 Abb. (N. S.) 360.

An address to the electors of the state, before election, signed as chairman of a public meeting, not privileged. *Lewis v. Few*, 5 Johns. 1; *Hunt v. Bennett*, 19 N. Y. 173; 4 E. D. Smith, 647.

Especially if it reflects upon a candidate. *Hunt v. Bennett*, 19 N. Y. 173; *Root v. King*, 7 Cow. 618; 4 Wend. 114.

A reflection upon the manager of an opera-house, not privileged. *Fry v. Bennett*, 8 Bosw. 200.

A fair criticism of a literary work, however severe, is privileged, unless it imputes unworthy motives to the author. *Reed v. Sweetser*, 6 Abb. (N. S.) 9, note; *Fry v. Bennett*, 5 Sandf. 54; 9 N. Y. Leg. Obs. 330; *Cooper v. Stone*, 24 Wend. 484.

Information furnished by a mercantile agency to all its customers, irrespective of their interest in the question, is not privileged, though given in good faith. *Taylor v. Church*, 8 N. Y. 452; 1 E. D. Smith, 279; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Lewis v. Chapman*, 16 N. Y. 369.

An affidavit before the governor, he not having jurisdiction, is not privileged. *Hosmer v. Loveland*, 19 Barb. 111.

Attorney's advice to client is privileged, unless express malice be shown. *Washburn v. Cook*, 3 Den. 110.

An attorney's declarations not pertinent to the controversy are otherwise. *Gilbert v. People*, 1 Den. 41; *Star v. Selden*, 4 N. Y. 91.

Privilege of counsel extends to all matters pertinent to the controversy, irrespective of motive. *Marsh v. Ellsworth*, 50 N. Y. 309; 1 Sweeny, 52; 36 How. 532; 2 Sweeny, 589.

Falsity of the charge is inadmissible where the report is privileged. *Ackerman v. Jones*, 5 J. & Sp. 42.

Publication of *ex parte* proceedings before a police magistrate, not privileged. *Stanley v. Webb*, 4 Sandf. 21; 8 N. Y. Leg. Obs. 209.

Grand jury proceedings are not privileged. *McCabe v. Cauldwell*, 18 Abb. Pr. 377.

Slandorous words uttered by a murderer at the time of his execution are not privileged when published. *Sanford v. Bennett*, 24 N. Y. 20.

An agreement made between persons interested in a prosecution to push the same, is privileged, even if exhibited to an outside party. *Kinck v. Colby*, 46 N. Y. 427.

Physician's certificate; given in good faith, that another is insane, is privileged. *Perkins v. Mitchell*, 31 Barb. 461.

The publication in a public journal of an article charging a member of the legislature with corruption, is not privileged. *Littlejohn v. Greeley*, 18 Abb. 41.

Communications made to the board of directors of a charitable institution regarding an employee, if made in good faith and without malice, are privileged. *Halstead v. Nelson*, 24 Hun. 395.

The transmission unnecessarily by a post-office telegram of libelous matter which would have been privileged if sent in a sealed letter, avoids the privilege. *Williamson v. Frear*, L. R., 9 Com. Pl. 393; 10 Eng. Rep. 225.

§ 254. Threatening to publish libel. — A person who threatens another with the publication of a libel, concerning the latter or concerning any parent, husband, wife, child or other member of the family of the latter, and a person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort, money or other valuable consideration from any person, is guilty of a misdemeanor.

§ 254a. Furnishing libelous information. — Any person who wilfully states, delivers or transmits by any means whatever

to the manager, editor, publisher or reporter, of any newspaper, magazine, publication, periodical or serial for publication therein any libelous statement concerning any person or corporation and thereby secures the actual publication of the same, is guilty of a misdemeanor.

In effect September 1, 1890. See Laws 1890, chap. 340.

TITLE X.

OF CRIMES AGAINST THE PERSON AND AGAINST PUBLIC DECENCY AND GOOD MORALS.

- CHAPTER**
- I. Crimes against religious liberty and conscience.
 - II. Rape, abduction, carnal abuse of children and seduction.
 - III. Abandonment and neglect of children.
 - IV. Abortions and concealing death of infant.
 - V. Bigamy, incest and the crime against nature.
 - VI. Violating sepulture and the remains of the dead.
 - VII. Indecent exposures, obscene exhibitions, books and prints and disorderly houses.
 - VIII. Lotteries.
 - IX. Gaming.
 - X. Pawnbrokers.

CHAPTER I.

OF CRIMES AGAINST RELIGIOUS LIBERTY AND CONSCIENCE.

- SECTION**
- 255. Profane swearing defined.
 - 256. Punishment of profane swearing.
 - 257. Summary conviction for profane swearing.
 - 258. Penalties, how collected
 - 259. The Sabbath.
 - 260. Sabbath breaking
 - 261. Day defined.
 - 262. Acts forbidden.
 - 263. Sunday labor.
 - 264. Persons observing another day as a Sabbath.
 - 265. Public sports.
 - 266. Trades, manufactures and mechanical employments.
 - 267. Public traffic.

SECTION 268. Serving process.

- 269. Punishment of Sabbath breaking.
- 270. Forfeiture of commodities exposed for sale.
- 271. Remedy for maliciously serving process.
- 272. Compelling adoption of a form of belief.
- 273. Preventing performance of religious acts.
- 274. Disturbing religious meeting.
- 275. Definition of the offense.
- 276. Processions and parades.
- 277. Theatrical and other performances.

Sections 255-258 repealed in 1882, chap. 384, p. 544.

§ 259. **The Sabbath.**—The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

The legislature has authority to protect the Christian Sabbath from desecration by such laws as it may deem necessary, and it is the sole judge of the acts proper to be prohibited, with a view to the public peace of that day. *Neuendorff v. Duryea*, 69 N. Y. 557; *Lindenmuller v. People*, 33 Barb. 548; 21 How. Pr. 156; *People v. Ball*, 42 Barb. 324; *People v. Hoym*, 20 How. Pr. 76; *Matter of Burke*, 59 Cal. 6; 43 Am. Rep. 231; *Com. v. Has*, 122 Mass. 40; *Com. v. Louisville, etc., R. Co.*, 8 Crim. L. Mag. 632. See, also, *Cooley Const. Lim.* (5th ed.) 589; 18 Am. L. Rev. 778; 33 Alb. L. J. 104; 12 Crim. L. Mag. 735, 961.

"With us the Sabbath, as a civil institution, is older than the government. The framers of the first constitution found it in existence; they recognized it in their acts, and they did not abolish it, or alter it, or lessen its sanctions or the obligations of the people to observe it." * * * In this state the Sabbath exists as a day of rest by the common law; and without the necessity of legislative action to establish it; and all that the legislature attempt to do in the 'Sabbath laws' is to regulate its observance." *Lindenmuller v. People*, 33 Barb. 568, 569; 21 How. Pr. 156. See as to Christianity and the common law, Whart. Crim. Law, § 20; 18 Alb. L. J. 866; 12 id. 359; 20 id. 265, 285; 29 Am. L. Reg. (N. S.) 273; *Cooley Const. Lim.* (5th ed.) 584-589; *People v. Ruggles*, 8 Johns. 210; *Andrews v. Bible Society*, 4 Sandf. 156; *Smith v. Wilcox*, 24 N. Y. 353; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127.

A village may ordain that places of business shall not be kept open on Sunday although the general law only forbids such labor on Sunday as "disturbs the peace and good order of society." *McPherson v. Village of Chebanse*, 114 Ill. 46; 55 Am. Rep. 857.

§ 260. **Sabbath breaking.**—A violation of the foregoing prohibition is Sabbath breaking.

See *Anonymous*, 12 Abb. N. C. 457.

§ 261. Repealed, 1892, chapter 677.

§ 262. Repealed, Laws 1883, chap. 358; 11 Stat. at Large, 502.

§ 263. **Sunday labor.**—All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community.

A contract to give instructions in the art of photography on Sunday is illegal and void, * * * and there can be no recovery for services rendered under it. *Bilordeaux v. Lithographic Co.*, 9 N. Y. Supp. 507; 80 State Rep. 656.

At common law the observance of the Sabbath was a duty of imperfect obligation. *Rez v. Brotherton*, 2 Str. 702; *Merrit v. Earle*, 29 N. Y. 122.

Labor performed on a Sunday is not *ipso facto* illegal. *Sun, etc., Ass'n v. Tribune, etc., Ass'n*, 44 N. Y. Super. 186.

Any private business may be done which the statute does not prohibit, and all contracts relating thereto are valid. *Merrit v. Earle*, 29 N. Y. 122; *Eberle v. Mehrbach*, 55 id. 682; *Batsford v. Every*, 44 Barb. 618; *Müller v. Roessler*, 4 E. D. Smith, 234.

The provisions of this section in so far as they authorize an interference by the police with the inter-state traffic of common carriers are repugnant to article 1, section 8, subdivision 3 of the Federal Constitution and void. *Dinsmore v. Board of Police*, 12 Abb. N. C. 487.

And such interference cannot be asserted as an exercise of the police power of the state. Id.

A different rule prevails where both the initial and terminal point of commerce is in the same state. Id.

In such a case a state may lawfully interdict a carrier from transacting its ordinary business, and from receiving and delivering non-perishable merchandise on Sunday in ordinary circumstances. Id.

A statute subjecting to punishment railway companies running their freight trains on Sunday is unconstitutional although the freight in question is in course of transportation to other states. *State v. Railroad Co.*, 24 W. Va. 783; 49 Am. Rep. 290.

§ 264. **Persons observing another day as a Sabbath.**—

It is a sufficient defense to a prosecution for work or labor on the first day of the week, that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

See *Isaacs v. Beth, etc., Society*, 1 Hilt. 469; *Mazson v. Annas*, 1 Den. 204; *Anonymous*, 12 Abb. N. C. 457; Cooley Const. Lim. *476, *477; *Desty Crim. Law*, § 117 and cases.

In *Johns v. State*, 78 Ind. 333; 41 Am. Rep. 577, it was held, that a statute prohibiting labor on Sunday is constitutional, although it provides that it shall not affect those who conscientiously observe the seventh day as the Sabbath.

In *City of Shreveport v. Levy*, 26 La. Ann. 671; 21 Am. Rep. 553, a municipal ordinance forbade the sale of goods on Sunday, but excepted from its operation those keeping their business places closed on Saturday; held, unconstitutional as giving to Jews a privilege denied to others. See, also, *Com. v. Has*, 132 Mass. 40; *Swann v. Swann*, 21 Fed. Rep. 299; *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768.

§ 265. **Public sports.**—All shooting, hunting, fishing, playing, horse racing, gaming or other public sport, exercises or shows, upon the first day of the week, and all noise disturbing the peace of the day, are prohibited.

Playing ball on private grounds with the consent of the owner, there being no noise or disturbance, is not an offense under this section. *People v. Dennen*, 3 N. Y. Cr. Rep. 127; 35 Hun, 323.

§ 266. **All trades, manufactures, agricultural or mechanical employments** upon the first day of the week are prohibited, except that when the same are works of necessity they may be performed on that day in their usual and orderly manner, so as not to interfere with the repose and religious liberty of the community.

In *Sanders v. Staten Island R. Co.*, 13 Abb. Pr. (N. S.) 355, the court say: "What is or is not a work of necessity or charity should be determined by the circumstances of each case. The evident object of the statute was to prevent the day from being employed in servile work, which is exhausting to the body, or in merely idle pastime subversive of that order, thrift and economy of health and substance which is necessary to the preservation of society. It was never intended to prohibit such a use of the day as would be conducive to the health and necessary recreation of the citizen."

The following have been held to be works of necessity:

The business of an ironmaster when engaged on Sunday in a process of smelting iron and other metallic ores, which process cannot be interrupted on Sunday without irreparable loss and damage to property. *Manhattan Iron Works Co. v. French*, 12 Abb. N. C. 448.

Operating an ice factory on Sunday is a work of necessity, it appearing that to close the factory over Sunday would result in losing from twenty-four to thirty hours after resuming operations, that time being required to reduce the temperature after such an interruption. *Hennersdorf v. State*, 11 Crim. L. Mag. 179.

It is lawful for a railway company to run trains for passengers, mails and express freight on Sunday. It is a "work of necessity." *Com. v. Louisville, etc., R. Co.*, 80 Ky. 291; 44 Am. Rep. 475.

It is lawful to make necessary repairs of a railway track on Sunday in order to avoid delaying trains on week days. *Yonoski v. State*, 79 Ind. 893; 41 Am. Rep. 614.

It is lawful for a common carrier to transport cattle on Sunday. *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; 40 Am. Rep. 415.

In a statute forbidding labor on Sunday except "works of charity or necessity," the word "necessity" does not imply a physical or absolute necessity; such labor as is necessary to the accomplishment of a lawful purpose, under the particular circumstances, is not prohibited. *Wilkinson v. State*, 59 Ind. 416; 26 Am. Rep. 84.

Where the prisoner had hauled to market on Sunday his dead-ripe crop of water-melons, which otherwise would have been spoiled, *held*, that this was a work of necessity within the meaning of the statute prohibiting labor on Sunday, except works of charity or necessity. *Id.*

The words "tending lock" on the canal do not of themselves purport to be servile labor, not necessary; that to "tend" was to watch, to guard, to do things necessary, etc., and would rather imply a necessary work. *People v. Lyons*, 5 Hun, 648.

Vending cigars, not work of necessity; *Anonymous*, 12 Abb. N. C. 458; *Mueller v. State*, 76 Ind. 810; 40 Am. Rep. 245; nor selling ice cream; *Phelps v. Board of Police*, 28 Daily Reg., No. 1; 5 Law Bull. 13; nor carrying on the business of a barber; *Com. v. Dextra*, 143 Mass. 28; 8 East. Rep. 350; *State v. Frederick*, 45 Ark. 347; 55 Am. Rep. 555; *Com. v. Jacobus*, 1 Penn. Leg. Gaz. 491; 32 Am. Rep. 557; *Philips v. Innes*, 4 Cl. & Fin. 284. *Contra, State v. Lorry*, 7 Baxt. 95; 32 Am. Rep. 555. See, also, 20 Am. L. Rev. 755.

§ 267. **Public traffic.**—All manner of public selling or offering for sale of any property upon Sunday is prohibited except that articles of food may be sold and supplied at any time before ten o'clock in the morning, and except also that meals may be sold to be eaten on the premises where sold or served elsewhere by caterers; and prepared tobacco in places other than where spirituous or malt liquors or wines are kept or offered for sale, and fruit, confectionary, newspapers, drugs, medicines, and surgical appliances may be sold in a quiet and orderly manner at any time of the day.

Tobacco is not a "drug" or a "medicine" within the exception of a statute allowing the sale and exposure for sale of "drugs and medicines" on Sunday. *State v. Ohmer*, 11 Crim. Law Mag. 378; citing 12 Abb. N. C. 458.

§ 268. **Serving process.**—All service of legal process of any kind whatever, on the first day of the week, is prohibited, except in cases of breach of the peace, or apprehended breach of

the peace, or when sued out for the apprehension of a person charged with crime, or except where such service is specially authorized by statute. Service of any process upon said day except as herein permitted is absolutely void for any and every purpose whatsoever. [*Amended; in effect June 5, 1892.*]

See *Broom Leg. Max.* (7th ed.) 22; 1 *Abb. New Prac. and Forms*, 385; *Hastings v. Farmer*, 4 N. Y. 296; *Van Vechten v. Paddock*, 12 Johns. 178; *Butler v. Kelsey*, 15 id. 177.

A writ of *habeas corpus* may be issued and served on a Sunday, but cannot be made returnable on that day. Code Civ. Proc., § 2015.

§ 269. Punishment of Sabbath breaking.—Sabbath breaking is a misdemeanor, punishable by a fine not less than five dollars and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both, but for a second or other offense, where the party shall have been previously convicted, it shall be punishable by a fine not less than ten dollars and not more than twenty dollars, and by imprisonment in a county jail not less than five nor more than twenty days.

§ 270. Forfeiture of commodities exposed for sale.—In addition to the penalty imposed by the last section, all property and commodities exposed for sale on the first day of the week in violation of the provisions of this chapter, shall be forfeited. Upon conviction of the offender by a justice of the peace of a county, or by any police justice or magistrate, or by a mayor, recorder or alderman of a city, such officer shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds paid to the overseers of the poor for the use of the poor of the town or city.

§ 271. Remedy for maliciously serving process.—Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

See *Maxson v. Annas*, 1 Den. 204.

§ 272. Compelling adoption of a form of belief.—An attempt, by means of threats or violence, to compel any person to adopt, practice or profess a particular form of religious belief, is a misdemeanor.

See State Const., art. 1, § 3; Fed. Const., First Amendment.

§ 273. **Preventing performance of a religious act.** — A person who willfully prevents, by threats or violence, another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.

§ 274. **Disturbing religious meetings.** — A person who willfully disturbs, interrupts or disquiets any assemblage of people met for religious worship, by any of the acts enumerated in the next section, is guilty of a misdemeanor.

See Snyder's Religious Corp. 98; 2 Bish. Crim. Law (7th ed.). § 301; 5 Am. & Eng. Encyc. of Law, 721; Moak's Underhill Torts, 225; 21 Abb. N. C. 23, note; 12 Am. L. Reg. (N. S.) 528.

The offense of disturbing public divine service was indictable at common law as well as under the Revised Statutes. *People v. Crowley*, 23 Hun, 412. See, also, Hawk. P. C., chap. 28, § 23; *People v. Degey*, 2 Wheel. C. C. 185; *Furren v. Warren*, 3 Wend. 253; *Foster v. Smith*, 10 id. 377; *State v. Smith*, 5 Harring. 490; *First Bap. Ch. v. Utica & Schen. R. Co.*, 6 Barb. 319; 5 id. 79.

A rule or regulation of a church, restraining a man from going out during service, is an infringement on natural liberty; and will not protect the officer acting under it. *People v. Brown*, 1 Wheeler Cr. Cas. 124.

A person disturbing a religious meeting, and interrupting its order and decorum, may be removed therefrom by the application of force sufficient for that purpose. *Wall v. Lee*, 34 N. Y. 141; *Reid v. Inglis*, 12 U. C. P. 191.

The officers of a religious corporation have power to remove disturbers, etc. *Becket v. Lawrence*, 7 Abb. Pr. (N. S.) 403.

To justify the application of force for the removal of a person interrupting the order and decorum of such meeting, it is not necessary that the disturbance should be willful. *Wall v. Lee*, 34 N. Y. 141; *Reid v. Inglis*, 12 U. C. P. 191.

It seems that in Catholic meetings it is appropriate that the priest as the presiding officer of the meeting should preserve order and rebuke all violations of it. *Wall v. Lee*, 34 N. Y. 141.

§ 275. **Definition of offense.**—The following acts, or any of them, except as permitted by chapter four hundred and seventy-nine of the laws of eighteen hundred and eighty-seven or the acts amendatory thereof, constitute a disturbance of a religious meeting.

1. Uttering any profane discourse, committing any rude or indecent act, or making any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting.

2. Engaging in, or promoting, within two miles of the place where a religious meeting is held, any racing of animals or gambling of any description; or elsewhere than in a city or village keeping open any huckster shop, inn, store or grocery, in any other place than that in which such business shall have usually been carried on; or elsewhere than in a city exhibiting within the distance aforesaid any shows or plays, unless the same shall have been duly licensed by the proper authorities.

3. Obstructing in any manner without authority of law, within the like distance, free passage along a highway to the place of such meeting.

In effect, as amended, July 1, 1893; Laws 1893, ch. 292.

In *Brown v. State*, 46 Ala. 175, the defendants galloped up to church in a noisy and profane manner, came into church, and one lay down on a rickety bench which creaked every time he moved. Up the road one of them caught a cow by the tail, causing her to jump and ring her bell. The party got off on the ground that there was nothing willful in their conduct.

In *State v. Edwards*, 32 Mo. 550, it was held that it was not within the act to disturb the attendants at a camp-meeting after they had gone to bed, but the contrary in *Jennings' Case*, 3 Gratt. 624, where the offender stole the horn from the preacher's stand, and disturbed the sleepers therewith.

The whole congregation need not be disturbed. So held in *Cockraham v. State*, 7 Humph. 11, where the offender cursed during meeting in the hearing of one alone.

It is unlawful to curse, fight or throw "rocks" in the churchyard while the congregation are dispersing. *Williams v. State*, 3 Sneed, 313.

So of disturbance of a meeting of church authorities held for the trial of a member, after the congregation is dismissed. *Hollingsworth v. State*, 5 Sneed, 518.

In *Lancaster v. State*, 53 Ala. 893; 25 Am. Rep. 625, a church member, after prayer meeting on Sunday morning, but before the congregation had gone, obtaining leave to speak, demanded "his letter," saying, "I cannot live in the church with liars, thieves, rogues and murderers." *Held*, guilty.

In *Hunt v. State*, 3 Tex. Ct. App. 116, the defendants cracked and ate peanuts during service. *Held*, guilty.

In *State v. Bledsoe*, Ark., the indictment charged that defendant talked, laughed, and took "a lady's hat and placed it under him as if he was then and there using the same as a chamber-pot, against the peace," etc. *Held*, guilty.

In *Williams v. State*, Ala., the defendant, wearing a pair of false moustaches, went forward while the preacher was calling for mourners, and extended his hand to the preacher. *Held*, guilty.

In *Layne v. State*, 4 Lea, 199, the defendant attended a Sunday-school Christmas festival at a school-house, drunk, lay on his back on the floor, kicked the Christmas tree and swore loud. *Held*, not disturbance of religious worship. So of a church business meeting opened with reading the Scriptures, singing hymns and prayer. *Wood v. State*, 11 Tex. Ct. App. 318.

In *State v. Linkhaw*, 69 N. C. 214; 12 Am. Rep. 645, the defendant was a strict member of the Methodist church, and a man of exemplary deportment, but he sang in such a way as to disturb the congregation. "The effect of it was to make one part of the congregation laugh, and the other mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." Once the preacher refused to have a hymn sung, and once the presiding elder had refused to preach on account of the disturbance. In spite of expostulations the defendant invariably replied that "he would worship his God, and as a part of his worship it was his duty to sing." One of the witnesses being asked to describe his singing, sang a verse in his voice and manner, which "produced a burst of long and irresistible laughter, convulsing alike the spectators, the bar, the jury and the court." The jury found him guilty, but this was reversed on the ground that there was no intention to disturb. See, also, *Owen v. Henman*, 1 Watts & Serg. 548.

§ 276. **Processions and parades.**— All processions and parades on Sunday in any city, excepting only funeral processions for the actual burial of the dead and processions to and from a place of worship in connection with a religious service there celebrated, are forbidden; and in such excepted cases there shall be no music, fire-works, discharge of cannon or fire-arms, or other disturbing noise. At a military funeral and at the burial of a national guardsman or of a deceased member of an association of veteran soldiers, or of a disbanded militia regiment, music may be played while escorting the body, but not within one block of a place of worship where service is then celebrated.

A person willfully violating any provision of this section is punishable by fine not exceeding twenty dollars, or imprisonment not exceeding ten days, or by both.

§ 277. **Theatrical and other performances.**— The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing with or without gloves, sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances or rope dancers on the first day of the week is forbidden; and every person aiding in such exhibition, performance or exercise by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition, performance or exercise, or who assents to the use of the same, for any such purpose, if it be so used, is guilty of a misdemeanor. In addition to the punishment therefor provided by statute, every person violating this section is subject to a penalty of five hundred dollars, which penalty "The Society for the Reformation of Juvenile Delinquents" in the city of New York, for the use of that society, and the overseers of the poor in any other city or town, for the use of the poor, are authorized, in the name of the people of this state, to recover. Besides this penalty, every such exhibition, performance or exercise, of itself, annuls any license which may have been previously obtained by the manager, superintendent, agent, owner or lessee, using or letting such building, garden, room, place or other structure, or consenting to such exhibition, performance or exercise.

See *Neuendorf v. Duryea*, 67 N. Y. 557, 25 Am. Rep. 235, note.

CHAPTER II.

RAPE, ABDUCTION, CARNAL ABUSE OF CHILDREN AND SEDUCTION.

- SECTION 278. Rape defined.
 279. When physical ability must be proved.
 280. Penetration sufficient.
 281. Compelling woman to marry.
 282. Abduction.
 283. No conviction on certain testimony.
 284. Seduction under promise of marriage.
 285. Subsequent marriage.
 286. No conviction on certain testimony.

§ 278. **Rape defined.**—A person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent, or

1. When through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent, or by reason of mental or physical weakness, or immaturity, or any bodily ailment, she does not offer resistance; or,

2. When her resistance is forcibly overcome; or,

3. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her; or,

4. When her resistance is prevented by stupor, or weakness of mind produced by an intoxicating or narcotic, or anæsthetic agent; or, when she is known by the defendant to be in such state of stupor or weakness of mind from any cause; or,

5. When she is, at the time, unconscious of the nature of the act, and this is known to the defendant; or when she is in custody of the law, or of any officer thereof, or in any place of lawful detention, temporary or permanent, is guilty of rape in the first degree and punishable by imprisonment for not more than twenty years. A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of sixteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years. [*In effect, as amended, Sept. 1, 1892.*]

“Rape is the unlawful carnal knowledge by a man of a woman, by force when she does not consent.” 2 Bish. Crim. Law, § 1073.

“Rape is the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm; but if such permission is given, the fact that it was obtained by fraud, or that the woman did not understand the nature of the act is immaterial.” Stephen’s Dig. Crim. Law, art. 254.

To support a charge of rape, if prosecutrix was conscious and in possession of her mental and physical powers, she must have resisted to the extent of her ability, and have been overcome by force or tempted into submission by threats, unless she was where that resistance would have been useless. *People v.*

Clemons, 8 N. Y. Cr. Rep. 565; *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349; *Oleson v. State*, 11 Neb. 276; 38 Am. Rep. 366. See, also, 19 Am. L. Rev. 357.

And a request so to charge the jury is proper. *People v. Monnais*, 17 Abb. 345; *Smith v. Fingar*, 1 Alb. L. J. 101.

The question of the amount of resistance is for the jury. *People v. Bowles*, 8 N. Y. Cr. Rep. 447; *People v. Connor*, 31 State Rep. 168.

If consent in any degree at any time of the occasion be yielded by the female, the crime is not consummated, but the yielding to overpowering force may be submission and not consent. *People v. Clemons*, 8 N. Y. Cr. Rep. 565; *Reg. v. Hallet*, 9 C. & P. 748; *Don Moran v. People*, 25 Mich. 356; 12 Am. Rep. 283; *Whitaker v. State*, 50 Wis. 518; 36 Am. Rep. 356; *Reg. v. Fletcher*, 8 Cox C. C. 181.

In *Reg. v. Dee*, 15 Cox Cr. Cas. 579; 36 Eng. Rep. 615; 6 Crim. L. Mag. 230, the prisoner had connection with a married woman, she believing that he was her husband; *held*, that the woman did not consent and the prisoner was guilty of rape. See 21 Eng. Rep. 192; 28 id. 548, 550, note.

In *Don Moran v. People*, 25 Mich. 356; 12 Am. Rep. 283, the jury was instructed that they might convict if they found that defendant procured the woman to have connection with him by fraudulent representations, which she believed, that it was a necessary part of his medical treatment of her. *Held*, error, for the reason that it did not recognize force as an essential element of the crime. See, also, *Barton v. People*, 1 Wheeler Cr. Cas. 378; *Whitaker v. State*, 50 Wis. 518; 36 Am. Rep. 356; *Pomeroy v. State*, 94 Ind. 96; 48 Am. Rep. 146; *Oleson v. State*, 11 Neb. 276; 38 Am. Rep. 366; *Walter v. People*, 50 Barb. 144. In the case last cited, defendant, while in attendance upon a female patient, had sexual connection with her upon two occasions, representing to her that she had a disease of the womb, and that a physical examination was necessary, and he had the carnal connection while professing to be making a medical examination, the judge, upon the trial, charged the jury that "as to the degree of force used, in a case like this, where resistance is not made by reason of a representation leading the female to believe that sexual penetration of her body is necessary for the recovery from disease, the force in ordinary sexual intercourse is sufficient to constitute a rape." *Held*, that the charge was erroneous. In the same case counsel for the prisoner requested the court to charge that "even if the defendant had accomplished his alleged purpose by fraud, without intending to use force, then such fraud does not constitute rape, unless the evidence shows that the defendant intended to use force if the fraud failed," and the court denied the request. *Held*, that the charge requested was, in some aspects of the case, correct, and the court should have charged the jury as indicated by the counsel.

The word "ravish" is indispensable in charging the crime of rape. *Gongleman v. People*, 3 Park. 15.

As to sufficiency of indictment, see *People v. Draper*, 28 Hun. 1; 1 N. Y. Cr. Rep. 138.

In an indictment for rape the allegation of "did forcibly ravish" is sufficient without adding "against her will." *Williams v. State*, 1 Tex. Ct. App. 90; 26 Am. Rep. 399.

"Ravish" implies force. *Com. v. Fogerty*, 8 Gray, 489; *State v. Johnson*, 67 N. C. 55.

In *Higgins v. People*, 1 Hun, 307; affirmed, 58 N. Y. 377, the judge charged the jury that if they believed, from all the evidence, that the complainant was not a virgin, it did not lessen the crime in the slightest degree. *Held*, correct.

On the trial of an indictment for rape the prisoner testified in his own behalf, the court charged that, "while his evidence is to be considered as that of any other witness, they should, in determining his credibility, consider the fact that he stood charged with the commission of a serious criminal offense." *Held*, no error. *People v. Crowley*, 102 N. Y. 234.

Evidence of an unsuccessful attempt by defendant four days previous is competent. *People v. O'Sullivan*, 104 N. Y. 481; 58 Am. Rep. 530; citing Whart. Crim. Ev. 35, 46, 49; *State v. Knapp*, 45 N. H. 156; *Strang v. People*, 24 Mich. 6; *Sharp v. State*, 15 Tex. App. 171; *Reg. v. Rearden*, 4 F. & F. 76; *Regina v. Jones*, 4 Law Rep. 154; *Rez v. Chambers*, 3 Cox Crim. Cas. 92; *Williams v. State*, 8 Humph. 585; *State v. Walters*, 45 Iowa, 389; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Lahey*, 14 Gray, 92; *Com. v. Merriam*, 14 Pick. 518; *State v. Marvin*, 35 N. H. 22; *State v. Wallace*, 9 id. 515; *State v. Way*, 5 Neb. 287; *Lawson v. State*, 20 Ala. 65; 56 Am. Dec. 182.

In *People v. Sharp*, 107 N. Y. 474, Peckham, J., says that the decision in the *O'Sullivan* case was "put upon the ground that upon the trial of a person for a particular crime, it is always competent to show upon the question of his guilt, that he had made an attempt at some prior time, not too remote, to commit the same offense."

The fact that the prosecutrix made complaint is admissible. *People v. Clemons*, 3 N. Y. Cr. Rep. 570; *Baccio v. People*, 41 N. Y. 265; *People v. Harrison*, 50 Hun, 46; *State v. Kinney*, 44 Conn. 153; 26 Am. Rep. 436. See, also, 80 Am. Dec. 371, note.

"Such proof is not and cannot be treated as any evidence of the fact so stated, but is admissible only on the question of her credibility and, therefore, can be received only when she has testified as a witness. *People v. McGee*, 1 Den. 19; *Baccio v. People*, 41 N. Y. 265." Bradley, J., in *People v. Clemons*, 3 N. Y. Cr. Rep. 570.

But the particulars of the complaint made by the prosecutrix to a third person in the absence of the person charged are not to any extent admissible in chief. *People v. Clemons*, 3 N. Y. Cr. Rep. 570; *Baccio v. People*, 41 N. Y. 265; Bk. IX, 81, note, where authorities are collated; *State v. Robertson*, 38 La. Ann. 618; 58 Am. Rep. 201; *People v. Mayes*, 66 Cal. 597; 56 Am. Rep. 126; *People v. McGee*, 1 Denio, 19; *Oleson v. State*, 11 Neb. 276; 38 Am. Rep. 366; *People v. Harrison*, 50 Hun, 46. See, also, Whart. Cr. Law, § 1150; 20 Eng. Rep. 394, note. *Contra*, *Benstine v. State*, 2 Lea. 169; 31 Am. Rep. 593; *State v. Kinney*, 44 Conn. 153; 26 Am. Rep. 436; *Reg. v. Wood*, 14 Cox Cr. Cas. 46; 20 Eng. Rep. 393.

If the prosecutrix is, by reason of imbecility, incompetent to be sworn as a witness, her declarations, made shortly after the assault, are incompetent to prove the commission of the offense. *Hornbeck v. State*, 35 Ohio St. 277; 33 Am. Rep. 608.

And it may be shown that the name of the person complained of, and other particulars, were mentioned by the prosecutrix to the witness; but what was

stated in those respects is not admissible. *People v. Clemons*, 3 N. Y. Cr. Rep. 570. In that case, the prosecution was allowed to ask of a witness the following question, to which an affirmative answer was given: "Did Cora (the prosecutrix) at that time charge that upon the preceding night William Clemons (the defendant) made an assault upon her and forcibly had sexual connection with her?" *Held*, error, calling for a new trial. *Contra*, as to name of ravisher, *State v. Robinson*, 38 La. Ann. 618; 58 Am. Rep. 201.

In a note to *Regina v. Langfield*, 56 Law Times (folio) 127, it is said that Mr. Justice Willes had repeatedly settled the form of question to be put to the prosecutrix as follows: "Did you complain to — of what the prisoner had done?"

Evidence of the appearance and condition of the prosecutrix, at the time she made complaint on the morning following the outrage, is admissible. *People v. Clemons*, 3 N. Y. Cr. Rep. 565; *People v. Crowley*, 4 East. Rep. 768; 102 N. Y. 284; 1 N. Y. State Rep. 388; *People v. Harrison*, 50 Hun, 46.

But evidence to the effect that she also threatened suicide some days afterward, is going a step beyond the well-authenticated rule, and its admission is error calling for a reversal. *People v. Batterson*, 50 Hun, 46.

And a doctor may express an opinion that the genital organs of the female had been penetrated with force within a week. *People v. Stott*, 5 N. Y. Cr. Rep. 61; *Com. v. Lynes*, Mass. . But see *Woodin v. People*, 1 Park. 464.

The rule which admits evidence of a disclosure made by the complainant to a third person, that the crime of rape had been committed upon her, requires that such disclosure should be recent, and made at the first suitable opportunity. *People v. O'Sullivan*, 104 N. Y. 481, 487; 58 Am. Rep. 530; *People v. Bowles*, 3 N. Y. Cr. Rep. 447; *Zopf v. Smith*, 55 Hun, 551.

Although the law requires promptness an immediate outcry may be excused or justified; it is not required to be made to the first person seen. *Higgins v. People*, 58 N. Y. 377.

Evidence of the first complaint of the prosecutrix ten months after the offense is incompetent. *People v. O'Sullivan*, 104 N. Y. 481; 58 Am. Rep. 530.

The delay is not excused by threats of the defendant, a priest, to the prosecutrix at confession, that if she told of him she would go to hell. *People v. O'Sullivan*, 104 N. Y. 481; 58 Am. Rep. 530. See, also, *Baccio v. People*, 41 N. Y. 265.

If the prosecutrix on cross-examination denies having voluntarily had connection with the prisoner prior to the alleged assault, evidence of such prior connection is admissible on the prisoner's behalf, to contradict her. *Reg. v. Riley*, 18 Q. B. Div. 481; 38 Eng. Rep. 537; *Hardike v. State*, 67 Wis. 552. See Gillett Crim. Law. § 732; Whart. Crim. Law (9th ed.), § 568; *People v. Abbott* 19 Wend. 200; *Barnes v. State*, 88 Ala. 204; 16 Am. St. 48.

Evidence of the character of the prosecutrix for chastity must be confined to what is generally said of her by those among whom she dwells or with whom she is chiefly conversant. While reputation in her immediate neighborhood is competent, reputation in a neighboring town is not. *Conkey v. People*, 1 Abb. Dec. 418; 5 Park. 31. But see *People v. Abbott*, 19 Wend. 192.

Evidence on behalf of the prisoner that the prosecutrix was in the habit of receiving men at her dwelling for the purpose of promiscuous intercourse with

them is proper. *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 800; *Brennan v. People*, 7 How. 171.

In the following cases evidence of previous acts of lewdness and unchastity by the complainant with other men was held admissible: *People v. Abbott*, 19 Wend. 192; *Crossman v. Bradley*, 53 Barb. 125; *Strang v. People*, 24 Mich. 1; *Sherwin v. People*, 69 Ill. 55; *State v. Murray*, 63 N. C. 31; *Titus v. State*, 7 Baxt. 132; *People v. Benson*, 6 Cal. 221; *State v. Reed*, 89 Vt. 417; *State v. Patterson*, 88 Mo. 88; 57 Am. Rep. 874. In the case last cited, the court say: "The opinion of Judge Cowen in *People v. Abbott*, 19 Wend. 192, * * * is a very able one reviewing the authorities then extant on the subject. That case has been criticised, but it has been frequently followed, and the ideas it embodies are fast gaining ground, as shown by some of the recent citations I have made. The reasoning of that case I have never seen answered, nor do I believe it can be."

In the following cases evidence of specific unchaste conduct of the prosecutrix, whether sought to be proved by herself or others, was held inadmissible: *People v. Jackson*, 3 Park. 391; *Shartzer v. State*, 63 Md. 149; 53 Am. Rep. 591; *State v. Knapp*, 45 N. H. 148; *Com. v. Regan*, 105 Mass. 593; *State v. Turner*, 1 Houst. 76; *State v. Vadnais*, 31 Minn. 383; *Reg. v. Holmes*, L. R., 1 Crown Cas. Res. 384; 12 Cox Crim. Cas. 187; 1 Eng. Rep. 226.

In *People v. Mason*, 57 Hun. 367; 32 State Rep. 131, defendant was convicted under an indictment which charged him with rape in two counts, one for sexual intercourse with a female not his wife against her will, and the other for sexual intercourse with a female not his wife, under the age of sixteen years. The evidence tended to establish the acts charged in the second count, but not those in the first. Held, that the conviction was wrong; that the acts charged in the second count did not constitute the crime of rape, and that there was a substantial variance between the crime charged, and the facts proved, which was fatal. See Desty's Crim. Law, § 134a, note d.

This decision is in direct conflict with *People v. Connor*, 31 State Rep. 168; affirmed, 126 N. Y. 278, where it was held that a charge that "by the law of this state a man who has sexual intercourse with a female not his wife under sixteen years of age commits rape upon her," is correct. See, also, 33 id. 790.

Subdiv. 1. See *State v. Atherton*, 58 Iowa, 189; *State v. Crow*, 10 West. L. Jour. 501; *Bloodworth v. State*, 6 Baxt. 614; 32 Am. Rep. 546; *Hornback v. State*, 35 Ohio St. 277; 35 Am. Rep. 608; *Queen v. Barratt*, L. R., 2 Cr. Cas. Res. 81; 7 Eng. Rep. 320.

Subdiv. 4. See *Reg. v. Fletcher*, L. R., 1 Cr. Cas. Res. 391; 10 Cox Crim. Cas. 248; 2 Bish. Crim. Law (6th ed.), § 1126; 1 Monthly Western Jur. 289.

Subdiv. 5. Woman intoxicated to insensibility. *People v. Quinn*, 50 Barb. 128; *Com. v. Burke*, 105 Mass. 376; 7 Am. Rep. 531.

Woman asleep. *Reg. v. Young*, 14 Cox Crim. Cas. 114; 28 Eng. Rep. 548; *Reg. v. Mayers*, 12 Cox Crim. Cas. 311; 4 Eng. Rep. 559.

A child within the age designated cannot consent. *People v. Stamford*, 2 Wheeler C. C. 152; *Singer v. People*, 13 Hun. 418; affirmed, 75 N. Y. 608; *Hays v. People*, 1 Hill, 351; *Reg. v. Connelly*, 26 Upp. Can. Q. B. 333; *Stephen v. State*, 11 Ga. 225; *Clivir v. State*, 45 N. J. L. 46; *O'Meara v. State*, 17 Ohio

§. 515; *Moore v. State*, id. 521; *Dawson v. State*, 29 Ark. 116; *State v. Tilman*, 30 La. Ann. 1249; 31 Am. Rep. 236; *Com. v. Roosnell*, 143 Mass. 32. See, also, 4 Bl. Com. 212; 1 Gabb Crim. Law, 832; Roscoe Crim. Ev. (7th ed.) 289, 351; 19 Eng. Rep. 680.

§ 279. **When physical ability must be proved.**—No conviction for rape can be had against one who was under the age of fourteen years, at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, beyond a reasonable doubt.

Prima facie a boy under fourteen years of age is incapable of committing rape. *People v. Randolph*, 2 Park. 674. *Contra*, 10 Crim. L. Mag. 89.

But this presumption may be rebutted by proof of the actual commission. *People v. Randolph*, 2 Park. 674; *Wagoner v. State*, 5 Lea, 352; 40 Am. Rep. 36; *Williams v. State*, 14 Ohio, 222.

Proof of capacity must be clear. *People v. Randolph*, 2 Park. 174; *Hiltabiddle v. State*, 35 Ohio St. 52; 35 Am. Rep. 595.

There is no definite period fixed by law when puberty will be inferred. *People v. Croucher*, 2 Wheel. Crim. Cas. 42.

§ 280. **Penetration sufficient.**—Any sexual penetration, however slight, is sufficient to complete the crime.

Woodman and Tidy Forensic Med. 640; Bish. Stat. Crimes, § 488. See 80 Am. Dec. 361; *People v. Crowley*, 102 N. Y. 237; 4 N. Y. Cr. Rep. 168; *Brown v. State*, 76 Ga. 623; *Taylor v. State*, 111 Ind. 279; *Reg. v. Hughes*, 9 C. & P. 752.

§ 281. **Compelling woman to marry.**—A person who by force, menace or duress, compels a woman against her will to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment for a term not exceeding ten years, or by a fine of not more than one thousand dollars, or by both. [*Amended*; in effect May 17, 1892.

§ 282. **Abduction.**—A person who,

1. Takes, receives, employs, harbors or uses, or causes, or procures to be taken, received, employed, harbored or used, a female under the age of sixteen years, for the purpose of prostitution; or not being her husband, for the purpose of sexual intercourse; or without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage; or,

2. Inveigles or entices an unmarried female of previous chaste character, into a house of ill-fame or of assignation, or elsewhere, for the purpose of prostitution or sexual intercourse; or

3. Takes or detains a female unlawfully against her will, with the intent to compel her by force, menace or duress, to marry him, or to marry any other person, or to be defiled; or,

4. Being parent, guardian or other person having legal charge of the person of a female under the age of sixteen years, consents to her taking or detaining by any person for the purpose of prostitution or sexual intercourse;

Is guilty of abduction, and punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

See Bish. Stat. Crimes (2d ed.), §§ 616-624.

In a legal sense "abduction" signifies the act of taking and carrying away of a child, ward, wife, etc., either by fraud, persuasion or open violence. *Carpenter v. People*, 8 Barb. 606; *State v. George*, 93 N. C. 567.

"Prostitution" is the practice of a female offering her body to the indiscriminate intercourse with men; the common lewdness of a female. *People v. Parshall*, 6 Park. 184; *Carpenter v. People*, 8 Barb. 603. See Anderson Law Dict. 839.

On the trial of *People v. Stott*, 4 N. Y. Cr. Rep. 308, Recorder Smyth charged the jury that: "Under this statute it is just as much a crime to take a female of previous unchaste character under the age of sixteen years either for the purpose of prostitution or for the purpose of sexual intercourse; and under this statute it is also immaterial whether the girl was taken for either of these purposes with or without the consent of her parents or the person having legal custody of her person. The object of the statute is very apparent. The legislature intended to protect females under the age of sixteen years from prostitution or from lending themselves for purposes of sexual intercourse."

The jury found a verdict of guilty, and on affirming the conviction (5 N. Y. Cr. Rep. 65) Davis, P. J., said: "The crime created by this statute is quite independent of the fact whether there be actual seduction or fornication or forcible intercourse, and the commission of neither of those offenses is material except when the crime is merged in the higher felony of rape. * * * Neither the intercourse nor the marriage need be proved if the purpose of taking be otherwise shown, but either of them may be proved when it has actually occurred as an element or incident tending to establish the purpose." See *Kauffman v. People*, 11 Hun, 82.

Subdiv. 1. To support a conviction it must be proved that there was a "taking" within the meaning of the act, and that such taking was for the purpose of prostitution. *People v. Plath*, 100 N. Y. 590.

The word "taking" implies some persuasive inducement on the part of the accused, not a mere permission or allowance to follow a life of prostitution. *People v. Plath*, 100 N. Y. 590; 53 Am. Rep. 236; 4 N. Y. Cr. Rep. 63.

The word "take" as used in the statute does not imply an actual manual capture of the female, nor need she be taken against her will. *People v. Plath*, 100 N. Y. 590; *Carpenter v. People*, 8 Barb. 603.

Mere seduction does not amount to a "taking." *People v. Parshall*, 6 Park. 129.

It is not necessary that the accused should in any case use force or practice fraud or deception. *People v. Seeley*, 101 N. Y. 642; 3 N. Y. Cr. Rep. 225; 87 Hun, 190; *People v. Marshall*, 59 Cal. 388; *Reg. v. Montielow*, 6 Cox Crim. Cas. 143; *People v. Carrier*, 46 Mich. 442.

Under the Illinois statute, similar to the above, when a girl, living with her parents, was persuaded or enticed to go to some convenient place from her father's house, in the immediate neighborhood, for the purpose of prostitution, where she remained only for an hour or two at a time, and continued to live with her father, *held*, that such persuasion or inducement constituted an abduction; that, if such inducements were offered as led the girl to leave her home, that the taking was complete; that the purpose of the taking, contemplated by the statute, is one existing in the mind of the perpetrator of the offense, and need not be known to the victim. *Slocum v. People*, 90 Ill. 274.

In *People v. Seeley*, 87 Hun, 190; 3 N. Y. Cr. Rep. 225; 101 N. Y. 642, the defendant, being acquainted with the prosecutrix, who was between fourteen and fifteen years of age, approached her while she was in the street in front of her house, with another girl about twelve years of age, and, after some conversation, asked her to go with him into certain grounds near by, which she refused, and defendant walked away. Shortly after he returned and renewed his request to prosecutrix, and asked her to go with him into said grounds and there have sexual intercourse with him, and offered to give her a dollar, which he said she could divide with her companion. The prosecutrix then consented, and defendant directed the way by which they should go, and went himself by another way, and they met at the spot designated, when defendant had sexual intercourse with both girls. They then separated, and met soon afterward on the street, where the accused gave prosecutrix fifty cents, which she shared with her companion. *Held*, sufficient to constitute the crime of abduction, under subdivision 1. See *People v. Powell*, 4 N. Y. Cr. Rep. 590; *State v. Gordon*, 46 N. J. L. 432.

As to whether this section fixes the age of sixteen as "the age of legal consent" for females within the meaning of section 1743 of the Code of Civil Procedure, see *Moot v. Moot*, 87 Hun, 288.

Whether or not the defendant knew that the female was under sixteen years of age at the time, is immaterial. *People v. Stott*, 4 N. Y. Cr. Rep. 306; affirmed, 5 id. 61.

The person abducting is bound to ascertain the girl's age, and if she turns out to be under sixteen, he must take the consequences. *Reg. v. Mycock*, 12 Cox Crim. Cas.; 2 Eng. Rep. 177. See *Reg. v. Prince*, L. R., 2 Cr. Cas. Res. 154; 1 Am. Crim. L. R. 1; 13 Eng. Rep. 385; *Reg. v. Packer*, 16 Cox Crim. Cas. 57; 87 Eng. Rep. 800; Bish. Stat. Crimes, § 1022; 1 Bish. Crim. Pr., §§ 522, 523.

It is immaterial whether the girl consents or not. *People v. Cook*, 61 Cal. 479; *Reg. v. Kipps*, 4 Cox Crim. Cas. 167.

The people cannot in the first instance, and for the purpose of making out a *prima facie* case, show that girls other than the person claimed to have been abducted were seen to visit defendant's room. *People v. Gibson*, 4 N. Y. Supp. 170; 6 N. Y. Cr. Rep. 390.

In *People v. Sheppard*, 5 N. Y. Cr. Rep. 186, the complainant, who had formerly worn a long dress, with her hair arranged so as to rest upon the top of her head, was put upon the witness stand in short clothes with her hair braided in a child-like way, for inspection by the jury. *Held*, error.

Sufficiency of charge to jury. See *People v. Brandt*, 14 State Rep. 419; 110 N. Y. 657.

Subdiv. 2. To sustain an indictment, actual chastity must be shown. General reputation for unchastity is not admissible. Lack of chastity can only be shown by proof of specific acts. *Kenyon v. People*, 26 N. Y. 203; *Kauffman v. People*, 11 Hun, 82; *Lyons v. State*, 52 Ind. 426; 1 Am. Crim. Rep. 28.

She must be shown to have been actually chaste up to the commencement of the acts of the party accused. *Carpenter v. People*, 8 Barb. 608; *Safford v. People*, 1 Park. 478.

The evidence of the female enticed, that she was unmarried at the time, is sufficient *prima facie* proof to bring a case within the statute. *People v. Kenyon*, 5 Park. Cr. 254, 289.

In *Schnicker v. People*, 88 N. Y. 192, it appeared that the prosecutrix, a German girl, who had been in this country about three weeks, went to the house of the accused, kept as a house of prostitution, not knowing its character, seeking employment as a domestic, and that the accused detained her there, by telling her that if she left she would be arrested, and by keeping the outer door locked; it appeared that the accused told her to go up stairs with a man, which she refused to do, that afterward a man was brought to her room and left there, who defiled her by force. *Held*, that a finding that she was taken against her will was justified, and that the intent of the accused to compel her by force, menace or duress to submit to defilement was a reasonable inference from the evidence.

It is competent for the prosecutrix to state why she went to the house of the accused, where she was detained against her will, and competent for the people to show that she went there for an innocent purpose. *Schnicker v. People*, 88 N. Y. 192.

Where the prosecutrix was left in a room, and a man afterward came there and defiled her by force, evidence of what occurred in the room is competent as a part of the *res gesta*. *Id*.

§ 283. **No conviction on certain testimony.**—No conviction can be had for abduction, compulsory marriage, rape, or defilement, upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence.

A conviction cannot be sustained upon the unsupported evidence of the female alleged to have been abducted as to either element constituting the crime, *i. e.*, the taking or the intent. *People v. Plath*, 100 N. Y. 590; 4 N. Y. Cr. Rep. 53; 53 Am. Rep. 236. See, also, *People v. Crowley*, 102 N. Y. 234.

Though a corroboration is required, the female is in no sense an accomplice of defendant. *People v. Powell*, 4 N. Y. Cr. Rep. 586.

The other evidence required by this section may be given by an accomplice of defendant. *People v. Powell*, 4 N. Y. Cr. Rep. 586.

If corroborated as to the facts of the taking, receiving and employing, etc., for the purpose of prostitution, and as to the fact of her being within the age prescribed by the statute, the conviction will stand. *People v. Brandt*, 14 State Rep. 419; affirmed, 110 N. Y. 647.

In *People v. Cullen*, 23 State Rep. 559; 5 N. Y. Supp. 886, in addition to the testimony of the complainant, a child, a physician testified that an examination of the child's person showed that an assault might have been committed. Held, proper to submit defendant's guilt or innocence to the jury. See, also, *People v. Stott*, 5 N. Y. Cr. Rep. 61.

The case of rape is an exception to the rule that the evidence of a witness cannot be corroborated or confirmed by proof that such witness stated the facts testified on the trial on some previous occasion when not under oath. *People v. O'Sullivan*, 104 N. Y. 481.

Evidence of the statements of the husband of the prosecutrix made in her presence on the day of the offense is admissible in corroboration of her testimony. *Conkey v. People*, 1 Abb. Dec. 418. See *Woodin v. People*, 1 Park. 464.

Whether the prosecutrix has been corroborated or not is a question for the jury. *Crandall v. People*, 2 Lans. 309.

§ 284. Seduction under promise of marriage.—A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

"Seduction as a Crime," 8 Crim. Law Mag. 331; 87 Am. Dec. 405-11; 8 Am. St. Rep. 870; 31 Cent. L. J. 44.

Webster defines seduction as "the act or crime of persuading a female, by flattery or deception, to surrender her chastity." Seduction has been defined as "the use of some influence, promise, art or other means on the part of a man by which he induces a woman to surrender her chastity and virtue to his embraces." Anderson Law Dict. 932; *Croghan v. State*, 22 Wis. 444; *Patterson v. Hayden*, 17 Ore. 238; 11 Am. St. Rep. 822; in this case the court say: "Courts have been more inclined to follow Webster's definition than those given by the legal lexicographers."

A woman cannot be said to be "seduced" who at the time of the alleged seduction was leading a lewd and lascivious life. *Patterson v. Hayden*, 17 Ore. 238; 11 Am. St. Rep. 822.

An illicit intercourse of long continuance not seduction. *Safford v. People*, 1 Park. 474.

If the prosecutrix have knowledge that the defendant was a married man at the time of the alleged seduction, it is a good defense. *People v. Alger*, 1 Park. 333; *Callahan v. State*, 63 Ind. 198; 30 Am. Rep. 211.

If the defendant, having arrived at the age of puberty, although under age, effect his purpose by promising to marry the girl, it is a sufficient and valid promise under the statute, and a promise on her part is implied if she yields, and she may testify that defendant's promise induced her to consent. *Kenyon v. People*, 26 N. Y. 208; 84 Am. Dec. 177; *People v. Kane*, 14 Abb. Pr. 15.

See, also, *People v. Hustis*, 32 Hun, 58; 2 N. Y. Cr. Rep. 448; *People v. DeFore*, 64 Mich. 698; 8 Am. St. Rep. 868.

A statute made it a felony for any person under promise of marriage to have illicit intercourse with a female infant of good repute for chastity. *Held*, that the promise need not be a valid one in fact if the infant understood it to be valid; and the indictment need not allege that the defendant was unmarried at the time. *Callahan v. State*, 63 Ind. 198; 80 Am. Rep. 211.

By "previous chaste character" in the statute is meant actual personal virtue and not reputation, and the fact that the female is in fact unchaste, can only be shown by proof of specific acts of lewdness on her part. *Kenyon v. People*, 26 N. Y. 208; 84 Am. Dec. 177.

A statute provided for the punishing of the seduction of any unmarried woman "of previously chaste character." *Held*, that "character" referred to moral qualities and not to reputation, and evidence of reputation was not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity. *State v. Prizer*, 49 Iowa, 531; 81 Am. Rep. 155.

On a prosecution for seduction of a woman of "good repute for chastity," the state must affirmatively prove such reputation. *Zabriskie v. State*, 43 N. J. L. 640; 89 Am. Rep. 610; *Oliver v. Com.*, 101 Penn. St. 215; 47 Am. Rep. 704; *Kaufman v. People*, 11 Hun, 86; *People v. Roderigan*, 49 Cal. 9.

The prosecution must prove the actual personal chastity of the complainant, although the statute is silent as to character or repute; *Polk v. State*, 40 Ark. 482; 48 Am. Rep. 17.

And it must be established beyond a reasonable doubt. *People v. Squires*, 49 Mich. 487.

In the following cases it was held, that previous chaste character was to be presumed until the contrary appears. *People v. Kane*, 14 Abb. 16; *Crosier v. People*, 1 Park. 458; *Wood v. State*, 48 Ga. 192; *State v. Higdon*, 32 Iowa, 262; *Conkey v. People*, 5 Park. 431.

An offer to prove by general reputation that the character of the prosecutrix was bad, is properly excluded. *Kenyon v. People*, 26 N. Y. 208; 84 Am. Dec. 177; *State v. Prizer*, 49 Iowa, 531; 81 Am. Rep. 155; *Crosier v. People*, 1 Park. 458; *People v. McArdle*, 5 id. 180; *Boyce v. People*, 55 N. Y. 644; *Carpenter v. People*, 8 Barb. 608; *Kaufman v. People*, 11 Hun, 82.

If the indictment is defective in not giving the correct surname of the female, the court on trial has power to cure the defect by directing an amendment. *People v. Johnson*, 104 N. Y. 213; 5 N. Y. Cr. Rep. 218; affirming 4 id. 591.

For form of indictment, see *People v. Kenyon*, 5 Park. 254; affirmed, 26 N. Y. 208.

For the purpose of affecting his credibility, defendant may be asked on cross-examination if he has had sexual intercourse with a person other than the prosecutrix, and in no way connected with the action. *People v. Eckert*, 2 N. Y. Cr. Rep. 470.

In *People v. Eckert*, *supra*, defendant at the time of the alleged seduction was sixteen years of age, and the prosecutrix about six years older. She had known defendant from boyhood, and the illicit intercourse was deliberately permitted until just before the child was born. The conduct of the prosecutrix with

other men showed great laxity of moral obligation. *Held*, that as the evidence was strongly against the probability of the alleged promise to marry, and against the purity of character of the prosecutrix, a new trial should be granted.

Upon a trial for seduction, the court should not instruct the jury upon the law of rape. *Reynolds v. People*, 41 How. Pr. 179.

§ 285. **Subsequent marriage.** — The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section.

§ 286. **No conviction on certain testimony.** — No conviction can be had for the offense specified in section two hundred and eighty-four, upon the testimony of the female seduced, unsupported by other evidence.

In *People v. Kearney*, 110 N. Y. 188; reversing 47 Hun, 129, the testimony of the prosecutrix was to the effect that the crime was committed in July, and that defendant thereafter had frequent intercourse with her until December. The prosecution was permitted to show, under objection and exception, that the prosecutrix had a child in August of the next year; *held*, error, that the evidence did not tend to corroborate the testimony of the female as to the commission of the crime charged, as it did not tend to show illicit intercourse thirteen months before the birth of the child.

The testimony of the female seduced need only to be supported as to the promise of marriage, and the carnal connection. *Armstrong v. People*, 70 N. Y. 38; *Kenyon v. People*, 26 id. 203; *People v. Hine*, 8 N. Y. Leg. Obs. 189; *Rice v. Com.*, 100 Penn. St. 28; *People v. Kearney*, 110 N. Y. 188.

The corroboration may be by circumstantial evidence. *Boyce v. People*, 55 N. Y. 644; *State v. Brinkhaus*, 7 Crim. Law Mag. 843; *State v. Hill*, 4 S. W. Rep. 121.

Evidence that defendant had opportunities to employ arts, deceptions and false promises is sufficient, as corroborative evidence, to connect him with the offense charged. *State v. Araah*, 55 Iowa, 250.

Whether the prosecutrix has been sufficiently corroborated is a question for the jury. *Crandall v. People*, 2 Lans. 309.

Evidence of previous acts of lewdness and unchastity by the complainant with other men is admissible. *State v. Patterson*, 88 Mo. 88; 57 Am. Rep. 374; *State v. Brassfield*, 81 Mo. 151; 51 Am. Rep. 234.

But not of subsequent acts. *Boyce v. People*, 55 N. Y. 644; *State v. Dietrick*, 51 Iowa, 467. *Contra*, *State v. Brassfield*, 81 Mo. 151; 51 Am. Rep. 234.

Where it is necessary to take the testimony of the prosecutrix through an interpreter, it is not error to allow the state to ask her, on her direct examination, if she had the intercourse with defendant after the promise of marriage, and if without the promise to marry she would have allowed the intercourse. *People v. Jensen*, 38 N. W. Rep. (Mich.) 811.

In *Cook v. People*, 2 Th. & C. 404, the prosecutrix was asked, "And would you have consented to it (the connection), in the absence of a promise?" *Held* inadmissible as calling for a merely speculative answer.

But the female may testify to the fact that she consented to the intercourse because of the promise. *State v. Brinkhaus*, 7 Crim. Law Mag. 343.

Evidence that defendant, subsequent to the seduction, had refused to marry the prosecutrix is inadmissible. *Cook v. People*, 2 Th. & C. 404.

• The existence of pregnancy is not essential to a conviction under the statute. *Id.*

If the prosecutrix have knowledge that defendant is a married man at the time of the alleged seduction, it is a good defense. *People v. Alger*, 1 Park. 333.

CHAPTER III.

ABANDONMENT AND OTHER ACTS OF CRUELTY TO CHILDREN.

SECTION 287. Abandonment of child under six years.

288. Unlawfully omitting to provide for child.

289. Endangering life or health of child.

290. Keepers of concert saloons, etc.

290a. Boarding infants without license.

291. Children not to beg, etc.

292. Certain employment of a child.

292a. Penalty for sending messenger boys to certain places.

292b. Taking apprentice without consent of guardian.

293. Duty of officers of society.

§ 287. Abandonment of child under six years.—A parent, or other person having the care or custody, for nurture or education, of a child under the age of six years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment for not more than seven years. [*In effect, as amended, Sept. 1, 1892.*]

See 1 Bish. Crim. Law (7th ed.), § 557; 1 Whart. Crim. Law (8th ed.), § 331. This statute is designed to protect the public. *People v. Nachr*, 30 Hun, 461.

Abandonment is not a continuous act, but the offense is complete when the separation takes place. *Bayne v. People*, 14 Hun, 181.

§ 288. Unlawfully omitting to provide for child.—A person who,

1. Willfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor, or to make such payment toward its maintenance as may have been required by the order of a court or magistrate when such minor has been committed to an institution; or,

2. Not being a superintendent of the poor, or a superintendent of alms-houses, or an institution duly incorporated for the purpose, without having first obtained a license in writing so to do from the board of health of the city or town wherein such females or children are received, boarded or kept, erects, conducts, establishes or maintains any maternity hospital, lying-in asylum where females may be received, cared for or treated during pregnancy, or during or after delivery; or receives, boards or keeps any nursing children, or any children under the age of twelve years not his relatives, apprentices, pupils or wards without legal commitment; or,

3. Being a midwife, nurse or other person having the care of an infant within the age of two weeks neglects or omits to report immediately to the health officer or to a legally qualified practitioner of medicine of the city, town or place where such child is being cared for, the fact that one or both eyes of such infant are inflamed or reddened whenever such shall be the case, or who applies any remedy therefor without the advice, or except by the direction of such officer or physician; or,

4. Neglects, refuses or omits to comply with any provisions of this section, or who violates the provisions of such license, is guilty of a misdemeanor. Every such license must specify the name and residence of the person so undertaking the care of such females or children, and the place and the number of females or children thereby allowed to be received, boarded and kept therein, and shall be revocable at will by the authority granting it. Every person so licensed must keep a register wherein he shall enter the names and ages of all such children and of all children born on said premises, and the names and residences of their parents, as far as known, the time of the reception and discharge of such children and the reasons therefor, and also a correct register of the name and age of every child under the age of five years who is given out, adopted, taken away or indentured from such place to or by any one, together with the name and residence of the person so adopting, taking or indenturing such child; and shall cause a correct copy of such register to be sent to the authority issuing such license within forty-eight hours after such child is so given out, adopted, taken away or indentured. It shall be lawful for the officers of any incorporated society for the prevention of cruelty to children and of such board of health at all reasonable times to enter and inspect the premises wherein such females and children are so boarded, received or kept, and also such license, register and the children. [*In effect, as amended, Sept. 1, 1892.*]

As to the duty of parents to provide for the maintenance of their children, see *Cromwell v. Benjamin*, 41 Barb. 558; *Kelly v. Davis*, 49 N. H. 176; 6 Am. Rep. 499.

After the death of the father the duty devolves on the mother. *Furman v. Van Sice*, 56 N. Y. 485; *Dedham v. Natick*, 16 Mass. 140.

One who, with no natural or legal duty, voluntarily seeks and assumes the care and custody of a child is amenable to the statute if he fails to perform the duty required, to the injury of the child. *People v. Cowley*, 83 N. Y. 464; 53 Am. Rep. 464.

§ 289. **Endangering life or health of child.**—A person who,

1. Willfully causes or permits the life or limb of any child actually or apparently under the age of sixteen years to be endangered, or its health to be injured, or its morals to become depraved; or,

2. Willfully causes or permits such child to be placed in such a situation, or to engage in such an occupation, that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired; is guilty of a misdemeanor.

See *People v. Cowley*, 83 N. Y. 464.

§ 290. **Keepers of concert saloons, etc.**—A person who,

1. Admits to or allows to remain in any dance house, concert saloon, theater, museum, skating rink, or in any place where wines or spirituous or malt liquors are sold or given away, or in any place of entertainment injurious to health or morals, owned, kept or managed by him in whole or in part, any child actually or apparently under the age of sixteen years, unless accompanied by its parent or guardian; or,

2. Suffers or permits any such child to play any game of skill or chance in any such place, or in any place adjacent thereto, or to be or remain therein, or admits to or allows to remain in any reputed house of prostitution or assignation, or in any place where opium or any preparation thereof is smoked, any child actually or apparently under the age of sixteen years; or

3. Sells or gives away, or causes or permits or procures to be sold or given away to any child actually or apparently under the age of sixteen years any beer, ale, wine, or any strong or spirituous liquor; or,

4. Being a pawnbroker or person in the employ of a pawnbroker, makes any loan or advance, or permits to be loaned or advanced to any child actually or apparently under the age of sixteen years any money, or in any manner directly or indirectly receives any goods, chattels, wares or merchandise from any such child in pledge for loans made or to be made to it or to any other person or otherwise howsoever; or,

5. Sells, pays for or furnishes any cigar, cigarette or tobacco in any of its forms to any child actually or apparently under the age of sixteen years; is guilty of a misdemeanor.

When the name of a person appeared on signs on the walls of a concert saloon as "manager," and where such person was seated at a desk and gave

directions, *held*, that such facts constituted him the manager of the place within the act. *People v. Geoghegan*, Sup. Ct., Sp. Term, Barrett, J., Apr. 25, 1883.

§ 290a. Boarding infants without license.—Any person, except corporations incorporated under the laws of this state for the purpose of receiving and caring for foundlings or abandoned or homeless infants, who receives or boards more than two infants under the age of three years in the same place at the same time, unaccompanied by their parents, relative or some person entitled to their custody, unless within two days after the reception of every such infant beyond the first two a license be duly issued by the mayor or board of health of the city or town wherein such infant is so to be received or boarded, specifying the name and age of the child and the name and place of residence of the person so undertaking its care and authorizing the same, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 291. Children not to beg, etc.—Any child actually or apparently under the age of sixteen years who is found:

1. Begging or receiving or soliciting alms, in any manner or under any pretense; or gathering or picking rags, or collecting cigar stumps, bones or refuse from markets; or

2. Not having any home or other place of abode or proper guardianship; or who has been abandoned or improperly exposed or neglected, by its parents or other person or persons having it in charge, or being in a state of want or suffering; or

3. Destitute of means of support, being an orphan, or living or having lived with or in custody of a parent or guardian who has been sentenced to imprisonment for crime, or who has been convicted of a crime against the person of such child, or who has been adjudged an habitual criminal; or

4. Frequenting or being in the company of reputed thieves or prostitutes, or in a reputed house of prostitution or assignation, or living in such a house either with or without its parents or guardians, or being in concert saloons, dance-houses, theaters, museums or other places of entertainment or places where wines, malt or spirituous liquors are sold, without being in charge of its parent or guardian; or playing any game of chance or skill in any place wherein or adjacent to which any beer, ale, wine or liquor is sold or given away, or being in such place; or

5. Coming within any of the descriptions of children mentioned in section two hundred and ninety-two, must be arrested and brought before a proper court or magistrate, who may commit the child to any incorporated charitable, reformatory, or other institution, and when practicable, to such as is governed by persons of the same religious faith as the parents of the child, or may make any disposition of the child such as now is or hereafter may be authorized in the case of vagrants, truants, paupers or disorderly persons, but such commitments shall, so far as is practicable, be made to such charitable or reformatory institutions.

Whenever any child shall be committed to any institution under this Code, and the warrant of commitment shall so state, and it shall appear therefrom that either parent, or any guardian or custodian of such child was present at the examination before such court or magistrate, or had such notice thereof as was by such court or magistrate deemed and adjudged sufficient, no further or other notice required by any local or special statute, in regard to the committal of children to such institution, shall be necessary, and such commitment shall in all respects be sufficient to authorize such institutions to receive and retain such child in its custody as therein directed.

Whenever any commitment of a child shall for any reason be adjudged or found defective a new commitment of the child may be made or directed by the court or magistrate, as the welfare of the child may require. And no commitment of a child which shall recite therein the facts upon which it is based shall be deemed invalid by reason of any omission of the court or magistrate by whom such commitment is made to file any documents, papers or proceedings relating thereto, or by reason of any limitation as to the age of the child committed, contained in the act or articles of incorporation of the institution to which it may have been committed.

6. Any magistrate having criminal jurisdiction may commit temporarily to an institution authorized by law to receive children on final commitment, and to have compensation therefor from the city or county authorities, any child under the age of sixteen years who is held for trial on a criminal charge; and may, in like manner, so commit any such child held as a witness to appear on the trial of any criminal case; which institution shall thereupon receive the same, and be entitled to the like compensation proportionally therefor as on final commitment, but subject to the order of the court as to the time of detention and discharge of the child. Any such child convicted of any misdemeanor shall be finally committed to some such institution, and not to any prison, or jail, or penitentiary, longer than is necessary for its transfer thereto. No child under constraint or conviction, actually or apparently under the age of sixteen years, shall be placed in any prison or place of confinement, or in any court-room, or in any vehicle for transportation in company with adults charged with or convicted of crime. [*Amended; in effect Sept. 1, 1892.*]

7. All cases involving the commitment or trial of children for any violation of the Penal Code, in any police court or court of special sessions, may be heard and determined by such court, at suitable times to be designated therefor by it, separate and apart from the trial of other criminal cases, of which session a separate docket and record shall be kept. [*Subdiv. 7 added 1892; in effect Sept. 1, 1892.*]

Acts for the prevention and punishment of wrongs to children are constitutional. *Matter of Donohue*, 1 Abb. N. C. 1.

In New York city, police justices have jurisdiction under this act. *Matter of Mosses*, 13 Abb. N. C. 189; 1 N. Y. Cr. Rep. 508; *Matter of Fina*, Daily Reg., Sept. 27, 1881; *Matter of Handley*, Daily Reg., Dec. 13, 1883; *Matter of McMahon*, 64 How. Pr. 285.

In *Matter of Haller*, 12 Hun, 131, the evidence showed that a boy, a cripple, was seen on the public street, holding out his hand to several persons and receiving money. *Held*, that such acts constituted "begging alms." The court say: "The intention of the law is not to punish such children, but to protect and provide for their necessities with tender care, and it would be a great mistake to hold that the statute does not include such, as by reason of their appalling misfortunes, need do nothing but silently attract attention to themselves to receive gifts of charity, unasked for in words, but really solicited by far more touching appeals. The poor boy in this case, while creeping through the throng of people on Broadway and Wall street, and raising his hand to receive their alms, was accomplishing the purpose of begging in a mode far more effective than to have sat at a corner and cried out to every passer-by for charity."

The collecting of cigar stumps, or refuse, whether from markets or other places, is within the act. *People, ex rel. Coreado, v. Catholic Protectory*, Sup. Ct. Chambers, Lawrence, J., Mar. 27, 1882. To same effect, *Matter of Allegi*, Sup. Ct. Chambers, Bartlett, J., Daily Reg., Aug. 22, 1884. See Laws 1882, chap. 410 (Consolidation Act), § 1463.

Where a young child lived for some years with a woman who neglected to provide proper food, clothing, care and amusement, and endangered his health by exposing him to the weather and by leaving him alone for hours, though no physical violence was used. *Held*, that such child was without proper guardianship. *People, ex rel. Newby, v. N. Y. S. P. C. C.*, Report of Hon. Nelson J. Waterbury, Referee; confirmed by Supreme Court, Special Term, Donohue, J., Daily Reg., Mar. 27, 1884.

A destitute child should be surrendered to the proper authorities. *People v. Conley*, 83 N. Y. 464. See Laws 1881, chap. 496, § 3; Laws 1882, chap. 410, § 1466, subd. 1.

Habitual criminal. See § 510, Code Crim. Proc., and § 690, *post*.

Whether the place be licensed or not makes no difference. *Com. v. Allen*, 15 B. Monr. 1; *Com. v. Harvey*, 16 id. 1.

The provisions of this section do not refer to a child casually and temporarily in the street without protection, but to those waifs who are in a permanent and usual condition of having no home, place of abode or guardianship, or who are permanently abandoned, improperly exposed, or in a state of want and suffering. *Matter of Maloney*, 51 Hun, 372; 6 N. Y. Cr. Rep. 248; *People v. N. Y. Catholic Protectory*, 106 N. Y. 608; 5 N. Y. Cr. Rep. 499; 19 Abb. N. C. 142; 44 Hun, 526.

When an essential ingredient or circumstance necessary to bring the case clearly within statute is omitted in the information, and the defect is not supplied by evidence, the conviction is bad. *Matter of Maloney*, 6 N. Y. Cr. Rep. 241; 51 Hun, 372; *People v. Catholic Protectory*, 106 N. Y. 604.

A commitment which recites that the child was charged with being "a disorderly child," is illegal. *People v. Mount Magdalene School of Industry*, 28 State Rep. 254.

A new commitment issued by another magistrate for another offense, without having the child brought before him, and without a new examination or legal evidence, or even personal knowledge of what occurred on the former examination, will not cure the defect. The provision as to issuing a new commitment was intended to permit the committing magistrate to cure a defect in a commitment made by him. *Id.*

A commitment which does not show that notice of the proceeding was given to the parent, guardian or custodian of the child is fatally defective. *Matter of Maloney*, 6 N. Y. Cr. Rep. 241; 51 Hun, 372.

The provisions as to giving of notice of the proceeding are imperative, not discretionary. *Matter of Maloney*, 6 N. Y. Cr. Rep. 241; 51 Hun, 342; *People v. N. Y. Catholic Protectory*, 106 N. Y. 608; 19 Abb. N. C. 142-5. See, also, *People v. Baker*, 19 State Rep. 489; *People, ex rel. Brown, v. Carpenter*, 33 id. 822.

A commitment for vagrancy should state that the person is a vagrant, but need not state all the particulars necessary to make out the offense. *Matter of Gray*, 11 Abb. Pr. 56; *People v. Moore*, 3 Park. 465; *Matter of Hogan*, 55 How. Pr. 458; *Matter of Moses*, 13 Abb. N. C. 1; 1 N. Y. Cr. Rep. 506.

In the case last cited, the commitment recited in substance, that certain children being under the age of fourteen were charged under oath with being vagrants, viz., "engaged in the occupation of begging under the pretext of peddling, and of frequenting the company of prostitutes," etc., at a time and place named; that the magistrate caused such persons to be brought before him for examination, and proceeded to inquire into the matter; and thereupon, having read the proofs and considered the matter, convicted such children of being vagrants, and committed them to the House of Refuge. *Held*, that the offenses were sufficiently charged; that the commitment was regular on its face, and that the facts were sufficiently stated and gave the magistrate jurisdiction.

When a statute gives a precise definition of vagrancy, the magistrate must follow it, and insert it in the warrant of commitment. *Matter of Forbes*, 19 How. Pr. 457.

It is not necessary that the warrant should contain the names of the witnesses or the testimony given by them; it is sufficient if it contain a brief statement of the offense charged, and the conviction and judgment thereon. *People v. Neilson*, 16 Hun, 214.

Evidence taken in writing, subscribed and sworn to by the witness, that a certain female child "actually and apparently under the age of fourteen years, to-wit, aged twelve years, was found begging, receiving and soliciting alms" in a specified street, establishes all that is required to justify a commitment. *People, ex rel. Perkerson, v. Sisters of the Order of St. Dominick*, 2 N. Y. Cr. Rep. 528; 1 How. Pr. (N. S.) 132; 34 Hun, 463. See, also, *Matter of Roach*, 18 Week. Dig. 514.

The sufficiency of the evidence upon which the commitment was issued cannot be examined into upon a return to a writ of *habeas corpus* or *certiorari* issued upon the application of the child. *People, ex rel. Perkerson, v. St. Dominick*, 34 Hun, 463; 2 N. Y. Cr. Rep. 528; *People, ex rel. Eck, v. American Guardian Society*, 1 How. Pr. (N. S.) 137; *Matter of Cohen*, Daily Reg., Dec. 26, 1884.

The New York Society for the Prevention of Cruelty to Children is authorized by law to receive children on commitment, and may be appointed guardian of the person of a minor child during its minority. Laws 1886, chap. 80; *Matter of Keiley*, Com. Pleas, 1 Monthly Law Bull. 74; *Matter of Donohue*, 1 Abb. N. C. 1.

It is not necessary that the commitment of a juvenile offender to the House of Refuge in the city of New York should specify the period of imprisonment; for this is fixed by the statute. *People v. Degnen*, 6 Abb. Pr. (N. S.) 87; 54 Barb. 105.

Section 5, chap. 172, Laws of 1865, giving authority to a magistrate to commit any children under the age of sixteen years deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons against the lawful commands of their fathers, mothers, etc., to the House of Refuge in the city of New York, is not inconsistent with any of the provisions of the Code of Criminal Procedure or the Penal Code, and is not repealed thereby. *Matter of Riley*, 18 N. Y. Weekly Dig. 515.

A commitment by a magistrate having jurisdiction is a final judgment under the *habeas corpus* act (§ 2016, Code of Civil Proc.), and cannot be reviewed. *Matter of Moses*, 18 Abb. N. C. 1; *Matter of Wright*, 29 Hun, 357; *Matter of Donohue*, 1 Abb. N. C. 1; *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559; *People, ex rel. Roddy, v. N. Y. Juvenile Asylum*, 12 Abb. Pr. 92; *Matter of Baker*, 11 How. Pr. 418, 425.

Where the respondent returned the commitment of a police magistrate, and the relator traversed the same, not denying that the commitment had been made, and the respondent demurred to the traverse, *held*, (1) that, as the commitment was valid upon its face, the action of the magistrate upon the merits could not be reviewed, it appearing by the return that he had jurisdiction; (2) that the court had not power to determine whether under all the circumstances the child should have been committed. *Matter of Barry*, Daily Reg., Mch. 10, 1885; *Matter of Averlino*, Andrews, J., Daily Reg., Mch. 10, 1885; *People, ex rel. Van Riper, v. N. Y. Catholic Protectory*, 106 N. Y. 604.

Where a conviction is drawn in question collaterally, upon *habeas corpus*, the commitment should be construed with a view to sustaining the conviction. *People v. Marchke*, 2 N. Y. Cr. Rep. 168.

Where a police magistrate committed a female child to the House of Mercy, under section 1466 of the Consolidation Act (chap. 410, Laws of 1882, as amended by chap. 353, Laws of 1885) upon an affidavit alleging that she was over the age of twelve — to-wit, of twenty-two years — and that she had been found on the day named in a reputed house of prostitution, *held*, that where it appears upon *habeas corpus* that the commitment recites the several facts necessary to show jurisdiction and the conviction upon sufficient evidence of the alleged charge, the writ should be dismissed and the prisoner remanded. *Held, further*, that the proceedings before the magistrate were in conformity with the statute, and that the commitment alleging proof of the female's age and of the fact that she had been found in such house and was in danger of becoming morally depraved, recited all the facts necessary to show jurisdiction and the conviction upon sufficient evidence of the alleged charge. *And held, further*, that no commitment made under this act is invalidated by any formal imper-

fection or defect in form; that the filing of an imperfect or incorrect record of conviction does not invalidate the conviction, and *semble*, that an omission to file such record does not invalidate the commitment. *Matter of Nichols*, 4 N. Y. State Rep. 659.

Where on a writ of *habeas corpus* the New York Juvenile Asylum made return that the child was not in its custody, but had been placed out west with certain parties, the court said: "The respondents had power under section 18 of their charter, in their discretion, to bind out the child in question to a person in the state of Illinois, if the laws of Illinois recognize the validity of such indenture, and as in this case there is nothing before me to show that the laws of said state do not recognize the validity of such indentures, the validity of the same will be assumed. Even if I am wrong in my construction of the statute, as the respondent shows that the child was not in its custody when the writ was served, and as there is nothing before me to show that he was sent out of the state for the purpose of evading the process of the court, I do not think that I can do otherwise than to dismiss this writ. *Matter of Forsyth* (per Lawrence, J.), 66 How. Pr. 180; *Matter of Larson* (Am. Female Guard. Soc.), 31 Hun, 539. See, also, Laws 1878, chap. 112, § 3.

Where the child was committed to the Protectory, and it appeared upon the return that the child had been placed in the House of the Good Shepherd by the protectory, which still retained the legal custody of her, and it was claimed that such transfer was in violation of law and of the statutes incorporating the Protectory; Barrett, J., dismissed the writ and remanded the child to the Protectory. *Matter of Moffit*, Daily Reg., May 4, 1886.

The papers upon which the writ was granted cannot be considered for the purpose of impeaching or contradicting the return. They can only be considered in determining the question as to the jurisdiction of the court to issue the writ. *People, ex rel. Downey, v. Dains*, 38 Hun, 43; *People, ex rel. McCarthy, v. French*, 25 id. 111.

A recital in a commitment of the age of a child is a final adjudication which cannot be inquired into on *habeas corpus*. *People v. The Superintendent, etc.*, 8 Abb. Pr. (N. S.) 112; *People v. The Keeper, etc.*, 37 How. Pr. 494.

A recital in a commitment that a child is "aged fourteen years," without words of limitation, such as "no more," is sufficient, and establishes the fact that the child is liable under the act. *Matter of Roach*, Gen. Term, 18 Weekly Dig. 514.

An erroneous recital of the title of the court making the commitment, will not invalidate the commitment. *Matter of Coughlin*, 62 How. Pr. 34.

After a person has been convicted under the acts relative to disorderly persons, and a record of conviction has been made up and signed (though not filed), the committing magistrate has no power to discharge the prisoner, or to take a recognizance. *People v. Duffy*, 5 Barb. 205; *People v. Brown*, 23 Wend. 47.

The omission to file the certificate was a neglect of duty on the part of the magistrate, which, if willful, would subject him to punishment as for a misdemeanor, but it cannot invalidate the judgment of the court of special sessions held by him. *People, ex rel. Hoey, v. Supt. House of Refuge*, Sup. Ct., April, 1860, MS. opinion.

It is no longer necessary, in order to sustain a commitment upon a conviction in a court of special sessions in the city of New York, that a record of the conviction should be filed in the county clerk's office. *Matter of Williamson* (1867), Sup. Ct., 3 Abb. Pr. (N. S.) 244.

The charter of the New York Catholic Protectory (Laws 1863, chap. 448; Consolidation Act, §§ 618, etc.) in regard to the commitment of children to that institution for certain offenses, was not repealed by section 291 of the Penal Code. *People, ex rel. Van Heck, v. N. Y. Catholic Protectory*, 4 N. Y. Cr. Rep. 79; 101 N. Y. 195; 3 How. Pr. (N. S.) 343; 22 Weekly Dig. 56; 38 Hun, 127.

The act of 1865, chap. 172, authorizing magistrates to commit any children under the age of sixteen "deserting their homes," etc., to house of refuge is not inconsistent with any provision of nor is it repealed by the Penal Code or Code of Criminal Procedure. *Matter of Riley*, 31 Hun, 612.

When permission for mother to see her child should not be given. *Matter of Diss Debar*, 3 N. Y. Supp. 667.

§ 292. Certain employment of a child prohibited.—

A person who employs or causes to be employed, or who exhibits, uses, or has in custody, or trains for the purpose of the exhibition, use or employment of, any child actually or apparently under the age of sixteen years; or who having the care, custody or control of such a child as parent, relative, guardian, employer, or otherwise, sells, lets out, gives away, so trains, or in any way procures or consents to the employment, or to such training, or use, or exhibition of such child; or who neglects or refuses to restrain such child from such training, or from engaging or acting, either

1. As a rope or wire walker, gymnast, wrestler, contortionist, rider or acrobat; or upon any bicycle or similar mechanical vehicle or contrivance; or,

2. In begging or receiving or soliciting alms in any manner or under any pretense, or in any mendicant occupation; or in gathering or picking rags, or collecting cigar stumps, bones or refuse from markets; or in peddling; or,

3. In singing; or dancing; or playing upon a musical instrument; or in a theatrical exhibition; or in any wandering occupation; or,

4. In any illegal, indecent or immoral exhibition or practice; or in the exhibition of any such child when insane, idiotic, or when presenting the appearance of any deformity or unnatural physical formation or development; or,

5. In any practice or exhibition or place dangerous or injurious to the life, limb, health or morals of the child,

Is guilty of a misdemeanor. But this section does not apply to the employment of any child as a singer or musician in a church,

school or academy; or in teaching or learning the science or practice of music; or as a musician in any concert; or in a theatrical exhibition, with the written consent of the mayor of the city, or the president of the board of trustees of the village where such concert or exhibition takes place. Such consent shall not be given unless forty-eight hours previous notice of the application shall have been served in writing upon the society mentioned in section two hundred and ninety-three of the Penal Code, if there be one within the county, and a hearing had thereon if requested, and shall be revocable at the will of the authority giving it. It shall specify the name of the child, its age, the names and residence of its parents or guardians, the nature, time, duration and number of performances permitted, together with the place and character of the exhibition. But no such consent shall be deemed to authorize any violation of the first, second, fourth or fifth subdivisions of this section.

In effect as amended Sept. 1, 1892, Laws 1892, chap. 309.

This section repeals by implication act 1876, chap. 122. *Ryan v. Buchanan*, 37 Hun, 425.

This section does not prohibit the employment of children in a dangerous "business or vocation," but only their employment in a dangerous "practice or exhibition." *Ryan v. Buchanan*, 37 Hun, 425.

Where three boys of the respective ages of fourteen, nine and eight years were employed as gymnasts and acrobats in a circus, *held*, that such occupation was dangerous, physically and morally; the contortions, evolutions and performance of the acrobat being clearly physically dangerous, and the surroundings, accompaniments and companions of the circus ring equally so morally, *held*, that such children were properly convicted under chapter 122, Laws of 1876 (in substance the same as above section), and properly committed to the New York Society for the Prevention of Cruelty to Children. *Matter of Donohue*, 1 Abb. N. C. 1.

Where a child was compelled to go through a performance on a tight rope, *held*, that such performance was dangerous to life and limb, and in violation of the act. *People v. Leonard*, Donohue, J., Dec. 11, 1876.

In *Matter of Rivers*, Donohue, J., May 25, 1877, a boy was employed as a pony rider and rope walker. *Held*, that he came within the act.

Where a child within the prescribed age, took part in a play performed in a theatre, but did not sing, or dance, or play on a musical instrument, *held*, that such performance was a theatrical exhibition, and that the person employing her came within the provisions of the statute. *People v. Alberle*, N. Y. Spec. Sess., affirmed by Hon. Rufus B. Coving, City Judge, March 27, 1883.

Exhibitions included in the terms opera, farce, interlude, comedy, tragedy, play, ballet, or which are in their nature dramatic, or are entertainments on the

stage, or on any part thereof, whether written or not, or whether or not impromptu, given in a public place called the "National Garden," where an admission of ten cents was charged, are theatrical performances within the terms of the statute (chap. 13, Laws 1839; chap. 281, Laws 1862). *The Society for the Ref. of Juv. Del. v. Diers*, Sup. Ct., Gen. Term, Jan., 1871, 10 Abb. Pr. (N. S.) 216.

Where a child was employed to dance and play upon castanets in a low drinking place, *held*, that the persons so employing her are liable under the act. *People v. Denabla*, N. Y. Spec. Sess., Nov. 16, 1876.

The employment of a child under the age of sixteen in singing and dancing in a public exhibition, called "children's opera," is expressly forbidden by statute. *Matter of Corinne*, Sup. Ct., Donohue, J., Daily Reg'ister, Dec. 16, 1881.

Where a girl of twelve years of age was kept for purposes of prostitution, *held*, that the person so keeping her was liable under the act for using such child in an indecent and immoral exhibition and practice. *People v. Perkins*, N. Y. Spec. Sess., affirmed by Recorder Smyth, 1884, MS. opinion.

§ 292a. Penalty for sending messenger boys to certain places.—A corporation or person employing messenger boys who:

1. Knowingly places or permits to remain in a disorderly house, or in an unlicensed saloon, inn, tavern or other unlicensed place where malt or spirituous liquors or wines are sold, any instrument or device by which communication may be had between such disorderly house, saloon, inn, tavern or unlicensed place, and any office or place of business of such corporation or person; or

2. Knowingly sends or permits any person to send any messenger boy to any disorderly house, unlicensed saloon, inn, tavern, or other unlicensed place, where malt or spirituous liquors or wines are sold on any errand or business whatsoever, except to deliver telegrams at the door of such house, is guilty of a misdemeanor, and incurs a penalty of fifty dollars to be recovered by the district attorney.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 292b. Taking apprentice without consent of guardian.—A person who takes an apprentice without having first obtained the consent of his legal guardian or unless a written agreement has been entered into as prescribed by law, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 293. **Duty of officers of society.**—A constable or police officer must, and any agent or officer of any incorporated society for the prevention of cruelty to children may, arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this chapter, and any minor coming within any of the descriptions of children mentioned in section two hundred and ninety-one or in section two hundred and ninety two.

Such constable, police officer or agent may interfere to prevent the perpetration in his presence of any act forbidden by this chapter.

A person who obstructs or interferes with any officer or agent of such society in the exercise of his authority under this chapter, is guilty of a misdemeanor.

All fines, penalties and forfeitures imposed or collected for a violation of the provisions of this Code, or of any act relating to or affecting children, now in force or hereafter passed, must be paid on demand to the incorporated society for the prevention of cruelty to children in every case where the prosecution shall be instituted or conducted by such a society; and any such payment heretofore made to any such society may be retained by it.

A corporation may be private and yet the act or charter contain provisions of a purely public character, introduced solely for the public good and as a general police regulation of the state. *Regents of Univ. of Maryland v. Williams*, 9 Gill & Johns. 388.

The New York Society for the Prevention of Cruelty to Children is authorized by the act under which it is incorporated, and it is the duty of that society, whenever the statutes relating to children are violated, to bring such violation to the attention of the court; to ask that the person or persons guilty of such violations be punished, and, if the case demands it, that the child in question be taken from the custody of those violating the law and be placed where he will be protected. *Matter of Corinne, supra*; *People, ex rel. N. Y. S. P. C. C., v. Gilmore*, 88 N. Y. 626.

The object and purpose of such societies is to see that the laws relating to children are rigidly and in good faith enforced, and for that purpose they may prefer complaints in any court or before any magistrate having jurisdiction. *People v. Strickland*, 13 Abb. N. C. 473. Laws of 1886, chap. 30, expressly confers this power, and by Laws of 1888, chap. 490, § 6. they are declared to be peace officers within the provisions of the Code.

No *ex parte* injunction will be granted against a society for the prevention of cruelty to restrain it, or its officers or agents, from enforcing the laws in relation to the prevention of cruelty. *Davis v. Society, etc.*, 16 Abb. Pr. (N. S.) 73.

Costs will not be awarded against the society even on appeal. *People v. Gilmore*, 88 N. Y. 626; reversing S. C., 26 Hun. 9.

Where an officer of the New York Society for the Prevention of Cruelty to Children discovered a child locked up alone in a room where a fire was burning, and thereupon removed such child from the room by means of a window and carried him to the society's office, *held*, that such removal was lawful, and that the child was a proper subject for the custody of the society. *People, ex rel. Newby*, v. N. Y. S. P. C. C., Daily Reg., Mar. 27, 1881.

No formal action on the part of the society as a corporation is necessary to enable an officer to prefer a complaint. *People v. Strickland*, *supra*.

CHAPTER IV.

ABORTION AND CONCEALING DEATH OF INFANT.

SECTION 294. Abortion defined.

295. Killing of child in attempting miscarriage

296. Concealing birth.

297. Selling drugs, etc.

§ 294. **Abortion defined.**—A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of a woman, or of the child of which she is pregnant, either

1. Prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug or substance; or,

2. Uses, or causes to be used, any instrument or other means;

Is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year.

See 1 Am. and Eng. Encyc. of Law, 28; Bish. Stat. Crimes (2d ed.), §§ 742-762.

Not essential to guilt that the woman should be quick with child, nor is it a defense that a harmless substance was administered provided the guilty intent existed. *State v. Fitzgerald*, 49 Iowa, 260; 31 Am. Rep. 148.

An indictment which charges the defendant with doing the act constituting the crime is sufficient, although the proof shows that he was absent at the time the crime was committed, but that he counseled, induced and procured its commission. *People v. Bliven*, 112 N. Y. 79.

It is not necessary for the people to show that the use of the instrument was not necessary to preserve the life of the woman, or of the child, but the burden of proving such necessity for its use rests upon the accused. *Bradford v. People*, 20 Hun, 309.

The absence of any such necessity need not be established by direct proof, but may be shown by circumstantial evidence bearing upon the subject. *Bradford v. People*, 20 Hun, 309.

If the drug is liable to cause injury to a pregnant woman it is noxious. *Dougherty v. People*, 1 Colo. 517; *State v. Geddicke*, 43 N. J. Law, 86.

Oil of juniper. *Reg. v. Cramp*, 5 Q. B. D. 307.

Oil of savin. *Reg. v. Stett*, 15 Can. L. J. 198.

The woman upon whose body the crime is committed is not an accomplice. *People v. Vedder*, 98 N. Y. 630; 8 N. Y. Cr. Rep. 32; *People v. Meyers*, 7 State Rep. 217; 5 N. Y. Cr. Rep. 121; *Watson v. State*, 9 Tex. App. 237.

But is herself guilty of another crime under section 295. *People v. Meyers*, 5 N. Y. Cr. Rep. 121.

A woman who goes with another to a physician's office, where the latter woman submitted, but not in the presence of her companion, to an operation for abortion, is not an accomplice. *Com. v. Drake*, 124 Mass. 21.

On the trial of an indictment charging the administration of a drug with intent to procure a miscarriage, whereby death resulted, the dying declarations of the deceased are not competent evidence against the defendant. *Railing v. Com.*, 110 Penn. St. 100; 2 East. Rep. 892; 7 Crim. L. Mag. 105; following *People v. Davis*, 56 N. Y. 95, and overruling *Com. v. Bruce*, 5 Crim. L. Mag. 680. See, also, *State v. Harper*, 35 Ohio St. 78; 35 Am. Rep. 596. *Contra* in Indiana, *Montgomery v. State*, 80 Ind. 338; 41 Am. Rep. 815; 2 Crim. L. Mag. 523.

It is error to allow a medical expert to give an opinion founded partly upon such statements. *People v. Murphy*, 101 N. Y. 126; 8 East. Rep. 765.

On the trial a witness was allowed to testify as to statements made in his presence which gave him the impression that the prisoner had attempted to produce abortion on other occasions. *Held*, error. *Swan v. People*, 13 Week. Dig. 518; citing 66 Barb. 486; 56 N. Y. 618; 45 id. 1; 32 Barb. 321.

Where an abortion is committed in one county and death results therefrom in another, an indictment therefor may be brought in the latter county. *Swan v. People*, 13 Week. Dig. 518.

§ 295. Killing of child in attempting miscarriage.—A pregnant woman, who takes any medicine, drug or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than four years.

See *People v. Myers*, 7 State Rep. 217; 5 N. Y. Cr. Rep. 126.

Killing unborn quick child. See §§ 190, 191, *ante*.

§ 296. Concealing birth.—A person who endeavors to conceal the birth of a child, by any disposition of the dead body of the child, whether the child died before or after its birth, is guilty of a misdemeanor.

§ 297. **Selling drugs, etc.**—A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony.

CHAPTER V.

BIGAMY, INCEST AND THE CRIME AGAINST NATURE.

SECTION 298. Bigamy defined; how punished.

299. Exceptions.

300. Indictment for bigamy

301. Punishment of consort.

302. Incest.

303. Crime against nature.

304. Penetration sufficient.

§ 298. **Bigamy defined; how punished.**—A person who, having a husband or wife living, marries another person, is guilty of bigamy, and is punishable by imprisonment in a penitentiary or state prison for not more than five years.

If a man on his return from a long journey find his wife married to another it is, nevertheless, bigamy for him to marry again. *Van Pelt's Case*, 1 City Hall Rec. 137.

A person against whom a decree of divorce for adultery has been obtained is guilty of bigamy if he or she marries again in this state during the life-time of the party obtaining the divorce. *People v. Faber*, 1 N. Y. Cr. Rep. 115; 92 N. Y. 146; 44 Am. Rep. 357; reversing 29 Hun, 320, and overruling *People v. Hovey*, 5 Barb. 117.

Bigamy is not punishable in this state unless the second marriage took place within its territorial jurisdiction. *People v. Mosher*, 2 Park. 195. See, also, *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *Moore v. Hegeman*, 92 N. Y. 521; 44 Am. Rep. 408; *Thorp v. Thorp*, 90 N. Y. 602; *Johnson v. Com.*, 86 Ky. 122; *People v. Merrill*, 2 Park. 590.

No defense that second marriage was between persons forbidden by statute to intermarry. *People v. Brown*, 84 Mich. 339; 22 Am. Rep. 531.

The fact that a husband was advised that an agreement under seal, signed by himself and his wife, providing that if either party should apply for a divorce the other party would not oppose the application nor appear against the petitioning party, was in legal effect a divorce, cannot be shown as a defense to an indictment for bigamy against the husband. *People v. Wood*, 29 Hun, 628; 1 N. Y. Cr. Rep. 349; affirmed, 96 N. Y. 625.

The prisoner is estopped from denying that the name of the person he is alleged to have married during the life time of his former wife is that which she gave to the clergyman who married them, and by which she signed the

marriage certificate in conjunction with the prisoner. *People v. Chase*, 28 Hun, 310; 16 Week. Dig. 143.

Evidence of barbarous treatment is no defense. *Walthorth's Case*, 1 City Hall Rec. 171.

First marriage must be proved. *Steer's Case*, 2 C. H. Rec. 111; *Coleman's Case*, 6 id. 3; *Phelan's Case*, id. 91; *People v. Whigham*, 1 Wheel. C. C. 115.

It is a sufficient marriage in fact that the parties agree to be husband and wife and cohabit and recognize each other as such. *Hayes v. People*, 25 N. Y. 390; 24 How. Pr. 452; 5 Park. 325; 15 Abb. 163.

Where defendant claims that his first marriage was void because the woman was at the time the wife of another, he must prove that there was a prior valid subsisting marriage. *Phelan's Case*, 3 C. H. Rec. 91.

Defendant's confessions not sufficient proof of first marriage. *People v. Humphrey*, 7 Johns. 314.

First marriage may be shown *prima facie* by reputation, cohabitation and admissions. *Dumas v. State*, 14 Tex. Ct. App. 464; 46 Am. Rep. 241, 245; collating the authorities for and against; *Holbrook v. State*, 34 Ark. 511; 36 Am. Rep. 17; *Miles v. United States*, 103 U. S. 304; 23 Alb. L. J. 326.

As long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. Until the first marriage is established she is *prima facie* the wife of the accused and cannot be used as a witness against him. *Miles v. United States*, 103 U. S. 304; 4 Lawson Defenses, 50.

§ 299. **Exceptions.**—The last section does not extend,

1. To a person whose former husband or wife has been absent for five years successively then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or,

2. To a person whose former marriage has been pronounced void, or annulled, or dissolved, by the judgment of a court of competent jurisdiction, for a cause other than his or her adultery; or,

3. To a person who being divorced for his or her adultery has received from the court which pronounced the divorce, permission to marry again; or,

4. To a person whose former husband or wife has been sentenced to imprisonment for life.

Subdiv. 1. In *People v. Meyer*, 8 State Rep. 257, the court charged the jury in substance that the defendant must have believed that his wife was not living in order to bring himself within the exception. *Held* correct.

Held, also, that although the wife of the defendant might have been absent for the length of time required by the statute, yet if he contracted the second marriage while she was in fact alive, and he had reason to believe her to be, and did so believe, although he did not have actual knowledge of the fact, he was guilty of bigamy.

The defendant was asked whether he stated to a lawyer that his wife had been absent over five years; that he had made diligent search to ascertain her whereabouts, and was unable to do so, and that he believed her to be dead. Also, whether the lawyer did not inform him that he had a right to marry. *Held*, that the questions had no material bearing on the question of his belief in the death of his wife, and were incompetent. *People v. Moyer*, 10 State Rep. 257.

There can be no conviction where the evidence as to the first wife showed only that she was alive three years before the second marriage. *People v. Teilen*, 58 Cal. 218; 41 Am. Rep. 258.

In the recent case of *The Queen v. Folsom* (1889), 23 Q. B. Div. 168; 40 Alb. L. J. 250, it was held by a divided court that a *bona fide* belief or reasonable grounds in the death of the husband at the time of the second marriage is a good defense to an indictment and that a conviction was wrong.

Subdiv. 2. No defense that subsequently to second marriage the first had been duly dissolved. *Baker v. People*, 2 Hill, 325; *Fleming v. People*, 27 N. Y. 829; *Gallaghan v. People*, 1 Park. 378.

An invalid divorce granted by court of sister state is no defense to an indictment for bigamy committed within this state. *People v. Baker*, 76 N. Y. 73; 32 Am. Rep. 274.

§ 300. **Indictment for bigamy.**—An indictment for bigamy may be found in the county in which the defendant is arrested, and the like proceedings, including the trial, judgment, and conviction, may be had in that county, as if the offense were committed therein.

The actual arrest before indictment found gives jurisdiction; nor will a subsequent escape or discharge on bail destroy such jurisdiction when once acquired. *King v. People*, 5 Hun, 297.

In *Collins v. People*, 4 Th. & C. 77, the proof showed that the second marriage took place in Yates county, and that the prisoner was apprehended in that county. *Held*, that a conviction in Oswego county was erroneous.

§ 301. **Punishment of consort.**—A person who knowingly enters into a marriage with another, which is prohibited to the latter by the foregoing provisions of this chapter, is punishable by imprisonment in a penitentiary or state prison, for not more than five years, or by a fine of not more than one thousand dollars, or both.

See *Sauser v. People*, 8 Hun, 302; *Blake v. Everman*, 56 id. 454.

§ 302. **Incest.**—When persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.

See 2 Wharton Crim. Law, § 1749; *U.S. v. Hiler*, 1 Morris, 380; *Com. v. Goodhue*, 2 Metc. 193; *Howard v. State*, 11 Ohio, 328; *Cook v. State*, 11 Ga. 53; *People v. Murray*, 14 Cal. 159.

The crime of incest is merged in that of rape. *People v. Harriden*, 1 Park. 844. But, see *contra*, 10 Am. and Eng. Encyc. of Law, 341.

No defense that the female with whom defendant is charged with having committed the crime, although his own daughter, is illegitimate. *People v. Lake*, 110 N. Y. 61.

Cannot be committed between step-father and step-daughter, after the death of the step-daughter's mother. *Johnson v. State*, 20 Tex. App. 609; 54 Am. Rep. 585.

Nor after the termination of the marriage relation of the step-father and the step-daughter's mother. *Noble v. State*, 22 Ohio St. 541.

Under a statute permitting husband or wife to testify the one against the other in a criminal prosecution for an offense committed by one against the other, the wife is not competent against the husband on a prosecution against him for incest with her daughter, his step-daughter. *Compton v. State*, 13 Tex. Ct. App. 271; 44 Am. Rep. 703.

Cohabitation between a man and his step-daughter is not incest. *Chancellor v. State*, 47 Miss. 278.

Unless required by statute, need not allege knowledge of relationship on the part of defendant. *State v. Wegman*, 59 Vt. 527; 59 Am. Rep. 753.

If one party have knowledge of the relationship and the other is ignorant thereof, the former may be convicted and the latter acquitted. *State v. Ellis*, 74 Mo. 385; 41 Am. Rep. 321.

"Brother" includes a brother of the half blood. *State v. Wegman*, 59 Vt. 527; 59 Am. Rep. 753.

Omission of the middle name of the female is not material when there is no question as to her identity. *People v. Lake*, 110 N. Y. 61.

After evidence of incestuous intercourse, evidence of prior acts of indecent familiarity and sexual connection is competent for corroboration. *State v. Markins*, 95 Ind. 464; 48 Am. Rep. 733; citing 2 Greenl. Ev., § 47; Whart. Crim. Ev., § 35.

In incest the woman is an accomplice, and on the trial of a prosecution therefor her testimony is subject to the rule respecting accomplice testimony. *Freeman v. State*, 11 Tex. Ct. App. 92; 40 Am. Rep. 787.

The rule is, without doubt, to the contrary in this state. See *People v. Powell*, 4 N. Y. Cr. Rep. 596; *People v. Vedder*, 98 N. Y. 630.

Where incest is accomplished by force it is punishable only as rape. *People v. Harriden*, 1 Park. 344.

In *State v. Thomas*, 53 Iowa, 214, the crimes of rape and incest were charged in one indictment, and it was held bad, because mutual consent is necessary to incest.

That incest and rape are distinct offenses, see 10 Cent. L. J. 327.

§ 303. **Crime against nature.**—A person who carnally knows in any manner any animal or bird ; or carnally knows any male or female person by the anus or by or with the mouth ; or voluntarily submits to such carnal knowledge ; or attempts sexual intercourse with a dead body is guilty of sodomy and is punishable with imprisonment for not more than twenty years. [*In effect, as amended, Sept. 1, 1892.*]

See § 34, *ante*; 2 Bish. Crim. Law (7th ed.), §§ 1191-1196; 29 Upp. Can. Q. B. 459; Russ. & Ryan, 331; *Reg. v. Brown*, 24 Q. B. Div. 337.

§ 304. **Penetration sufficient.**—Any sexual penetration, however slight, is sufficient to complete the crime specified in the last section.

See § 280, *ante*.

CHAPTER VI.

VIOLATING SEPULTURE AND THE REMAINS OF THE DEAD.

SECTION 305. Right to direct disposal of one's own body after death.

- 306. Duty of burial.
- 307. Burial in other states.
- 308. Dissection when allowed.
- 309. Unlawful dissection a misdemeanor.
- 310. Remains after dissection must be buried.
- 311. Body stealing.
- 312. Recovering stolen body.
- 313. Opening grave.
- 314. Arresting or attaching a dead body.
- 315. Disturbing funerals.

§ 305. **Right to direct disposal of one's own body after death.**—A person has the right to direct the manner in which his body shall be disposed of after his death ; and also to direct the manner in which any part of his body, which becomes separated therefrom during his lifetime, shall be disposed of ; and the provisions of this chapter do not apply to any case where a person has given directions for the disposal of his body or any part thereof inconsistent with those provisions.

§ 306. **Duty of burial.**—Except in the cases in which a right to dissect it is expressly conferred by law, every dead body of a human being, lying within this state, must be decently buried within a reasonable time after death.

See 4 Bradf. 503, 532; 12 Eng. Rep. 656; 29 id. 628; 18 Abb. N. C. 75; 18 Alb. L. J. 485; 10 id. 70; 23 id. 106.

Strictly speaking there is no right of property in a dead body. 4 Am. L. Rev. 57; *Matter of Beekman Street*, 4 Bradf. 503; *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 481; *Williams v. Williams*, L. R., 20 Ch. Div. 659.

In *Weld v. Walker*, 180 Mass. 422; 39 Am. Rep. 465, the court say: "Neither the husband nor the next of kin have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are in this country, where there are no ecclesiastical courts, within the jurisdiction of a court of equity. 2 Bl. Com. 429; *Meagher v. Driscoll*, 99 Mass. 281; *Matter of Beekman Street*, 4 Bradf. 503; *Pierce v. Swan Point Cemetery*, 10 R. I. 237; 14 Am. Rep. 667." See, also, *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 481; *Snyder v. Snyder*, 60 How. Pr. 368.

Dr. Burns, quoting Gibson's *Codex Juris. Ecclesiæ Anglicanæ*, says: "Every parishioner hath and had always a right to be buried in" the parish burial ground. Burns' *Ecc. Law*, 1, 257.

In *Rex v. Stewart*, 12 Adol. & Ellis, 773, the court say: "Every person dying in this country * * * has a right to Christian burial; and that implies the right to be carried from the place where the body lies to the parish cemetery."

In *Snyder v. Snyder*, 60 How. Pr. 368, Landon, J., said: "It is asserted in many cases, following the Roman law, that the exclusive right to burial and the right to select the place of burial rests in the absence of any testamentary direction on the part of the deceased in the next of kin." Citing 4 Bradf. 532; 3 Edw. Ch. 152; *Copper's Case*, 58 How. Pr. 55; Tyler's *Ecclesiastical Law*, § 971; *Rousseau v. City of Troy*, 49 How. Pr. 492; *Wyncoop v. Wyncoop*, 42 Penn. St. 293.

It is the husband's right and duty to bury his deceased wife. *Patterson v. Patterson*, 59 N. Y. 583; *Durell v. Hayward*, 9 Gray, 248; *Lakin v. Ames*, 10 Cush. 196, 221; *Cunningham v. Reardon*, 98 Mass. 538; *Jenkins v. Tucker*, 1 H. Bl. 90.

Even where no such duty exists, as in the case of an infant widow burying her husband, the law so far recognizes the former relationship of husband and wife that it will enforce a contract made by the wife for the burial of her husband. *Chappell v. Cooper*, 3 M. & W. 259.

Where the owner of some estate dies, the duty of burial is upon the executor. *Patterson v. Patterson*, 59 N. Y. 583.

The privilege of burial in a public cemetery is a mere license, subject to municipal regulation, and revocable according to public necessity. *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 481; *Windt v. German Reformed Church*, 4 Sandf. Ch. 471; *Dwenger v. Geary*, 118 Ind. 118.

§ 307. **Burial in other states.**—The last section does not impair any right to carry the dead body of a human being through this state, or to remove from this state the body of a person dying within it, for the purpose of burying the same elsewhere.

§ 308. **Dissection, when allowed.**—The right to dissect the dead body of a human being exists in the following cases:

1. In the cases prescribed by special statutes ;
2. Whenever a coroner is authorized by law to hold an inquest upon the body, so far as such coroner authorizes dissection for the purposes of the inquest, and no further ;
3. Whenever and so far as the husband, wife or next of kin of the deceased, being charged by law with the duty of burial, may authorize dissection for the purpose of ascertaining the cause of death, and no further ;
4. Whenever any district attorney in this state, in the discharge of his official duties, shall deem it necessary, he may exhume, take possession of, and remove the body of a deceased person, or any portion thereof, and submit the same to a proper physical or chemical examination, or analysis, to ascertain the cause of death, and the same shall be made on the order of any justice of the supreme court of this state, or the county judge of the county in which such dead body shall be, which order shall be made on the application of the district attorney, with or without notice to the relatives of the deceased person, or to any person or corporation having the legal charge of such body, as the court may direct. Said district attorney shall have power to direct the sheriff, constable, or other peace officer in this state, or to employ such person or persons as he may deem necessary to assist him in exhuming, removing, obtaining possession of and examining physically or chemically such dead body or any portion thereof. The expense therefor shall be a county charge, to be paid by the county treasurer on the certificate of the district attorney.

See *People v. Fitzgerald*, 105 N. Y. 146.

§ 309. **Unlawful dissection a misdemeanor.**—A person who makes, or causes or procures to be made, any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased, is guilty of a misdemeanor.

§ 310. **Remains after dissection must be buried.**—In all cases in which a dissection has been made, the provisions of this chapter, requiring the burial of a dead body, and punishing

interference with or injuries to it, apply equally to the remains of the body dissected, as soon as the lawful purposes of such dissection have been accomplished.

§ 311. **Body stealing.**—A person who removes the dead body of a human being, or any part thereof, from a grave, vault, or other place where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to sell the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years, or by a fine not exceeding one thousand dollars, or both.

On application of defendant, and on affidavits sufficient to give jurisdiction, a coroner directed the exhumation of a body for the purpose of a *post-mortem* examination to determine whether the deceased was murdered, and the body was accordingly exhumed and a public examination had without impaneling a jury. *Held*, not body stealing. *People v. Fitzgerald*, 105 N. Y. 146; 59 Am. Rep. 483; 5 N. Y. Cr. Rep. 335.

§ 312. **Receiving stolen body.**—A person who purchases or receives, except for the purpose of burial, the dead body of a human being, or any part thereof, knowing that the same has been removed contrary to the last section, is punishable by imprisonment for not more than three years.

§ 313. **Opening grave.**—A person who opens a grave or other place of interment, temporary or otherwise, or a building wherein the dead body of a human being is deposited while awaiting burial, without authority of law, with intent to remove the body, or any part thereof, for the purpose of selling it or demanding money for the same, or for the purpose of dissection, or from malice or wantonness, or with intent to steal or remove the coffin or any part thereof, or anything attached thereto, or any vestment or other article interred, or intended to be interred with the dead body, is punishable by imprisonment for not more than two years, or by a fine of not more than two hundred and fifty dollars, or by both.

It is not a violation of the spirit of the statute against removing a dead body from a grave, for a father to cause the body of his child to be disinterred, and a thigh bone to be removed, in order that it may be used as evidence in an action for malpractice, and the body then returned to the grave; such removal

not being for the purpose of dissection, or from mere wantonness. *Rhodes v. Brandt*, 21 Hun, 1.

When a body has once been buried no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal or judicial authority. *Regina v. Sharpe*, Dears. & Bell, 160; 7 Cox C. C. 214; *Wynkoop v. Wynkoop*, 42 Penn. St. 293; *Pierce v. Cemetery Co.*, 10 R. I. 227; 14 Am. Rep. 667.

In *Regina v. Sharpe*, Dears. & Bell, 160; 7 Cox C. C. 214, a man was indicted and convicted of a misdemeanor, for disinterring and removing, without authority, the body of his mother, and the conviction was sustained, although the removal was properly and decently made and for the purpose of burying the body by the side of the prisoner's father, recently deceased. See, also, *Regina v. Feist*, 7 Cox C. C. 590; *Com. v. Cooley*, 10 Pick. 39.

In 4 Bl. Com. 236, 237, stealing a corpse is mentioned as a matter of great indecency; and the law of the Franks is mentioned which directed that a person who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants till the relatives of the deceased consented to his re-admission.

It was a felony at common law to steal a shroud or apparel from a dead body. 1 Hale P. C. 515; 1 Russell Crimes, 629; 3 Dane Abr. 18.

The legislature has a right to authorize a municipality to remove the remains of the dead from cemeteries. *Craig v. Presbyterian Church*, 88 Penn. St. 42; 32 Am. Rep. 417; *Coates v. New York City*, 7 Cow. 585.

The charter of a cemetery company authorized it to acquire and use land not exceeding five hundred acres for burial purposes. After it had acquired the land and spent money in preparing and adorning the same, a statute was passed forbidding the company to use any of its lands for burial purposes outside of its then inclosure, which was less than five hundred acres. Held, that as it did not appear that any nuisance existed or was liable to arise, the statute was not a valid exercise of the "police power," and was unconstitutional. *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; 28 Am. Rep. 71.

A by-law, made in pursuance of a statute empowering municipal councils to make by-laws for regulating the interment of the dead, is not *ultra vires* by reason of its prohibiting interment altogether in a particular cemetery, and thereby destroying the private property of the owners of burial-places therein. *Slattery v. Naylor*, 18 App. Cas. 446; 39 Eng. Rep. 113.

§ 314. **Arresting or attaching a dead body.**—A person who arrests or attaches the dead body of a human being upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

§ 315. **Disturbing funerals.**—A person who, without authority of law, obstructs or detains any persons engaged in carrying or accompanying the dead body of a human being to a place of burial, is guilty of a misdemeanor.

CHAPTER VII.

INDECENT EXPOSURES, OBSCENE EXHIBITIONS, BOOKS AND PRINTS,
AND BAWDY AND OTHER DISORDERLY HOUSES.

SECTION 316. Exposure of person.

317. Possessing, etc., obscene prints.

318. Indecent articles, etc.

319. Mailing, carrying obscene prints, etc.

320. Warrant to sheriff to search, etc.

321. Physician's instruments.

322. Keeping disorderly houses, etc.

§ 316. Exposure of person. — A person who willfully and lewdly exposes his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another so to expose himself, is guilty of a misdemeanor.

See 11 Crim. Law Mag. 461; 2 Moak's Eng. Rep. 160.

Six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in a house of prostitution, the doors, windows and shutters being closed. *Held*, that the place was public. *People v. Bisby*, 4 Hun, 636; 67 Barb. 221.

The indecent exposure of his person by a man in a house to a girl eleven years old is "open and gross lewdness and lascivious behavior." *Com. v. Wardell*, 128 Mass. 52; 35 Am. Rep. 357.

An indecent exposure in a place of public resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance. *Rez v. Webb*, 1 Den. C. C. 338. See *Reg. v. Farrell*, 9 Cox C. C. 446.

But this view of the law has since been doubted in the case of *R. v. Elliott*, Leigh & Cave, 108.

The prisoner was indicted for an indecent exposure in an omnibus, several passengers being therein. The indictment contained two counts; one laid the offense as having been committed in an omnibus, and the other in a public highway. It was held that an omnibus was sufficiently a public place to sustain the indictment. *R. v. Holmes*, 1 Dears. C. C. 207.

Where a man indecently exposed his person upon the roof of a house, where his act could not be seen by persons passing along the highway, but where it was seen by seven persons from the back windows of another house, it was held that he was rightly convicted of exposing his person in a public place. *R. v. Thallman*, L. & C. 326; 9 Cox Crim. Cas. 383.

The intent with which the act is done is material and is a question of fact for the jury; and a charge which withdraws that question from them as a question of fact is erroneous. *Miller v. People*, 5 Barb. 203.

It is not essential to the crime of indecent exposure that anybody should have seen the exposure, provided it were intentionally made, in a public

place, and persons were present who could have seen if they had looked. *Van Houten v. State*, 46 N. J. L. 16; 50 Am. Rep. 897.

In order to support an indictment for indecent exposure in a public place it is sufficient to show that the offense was committed in a place where an assembly of the public collected. *Reg. v. Willard*, 15 Cox C. C.; 36 Eng. Rep. 610.

§ 317 **Possessing, etc., obscene prints.**—A person who sells, lends, gives away or shows, or offers to sell, lend, give away, or show, or has in his possession with intent to sell, lend or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, or who writes, prints, publishes or utters, or causes to be written, printed, published or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing, named in this section can be purchased, obtained or had, or who

2. Prints, utters, publishes, sells, lends, gives away or shows, or has in his possession with intent to sell, lend, give away or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; or who

3. In any manner, hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, or any of them, is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more

than one year imprisonment, or be fined not less than fifty dollars, nor more than one thousand dollars, or both, for each offense.

See *Willis v. Warren*, 1 Hilt. 590.

Prosecutions under subdivisions 1 and 2 of this section properly belong to the Society for the Suppression of Vice. Laws 1873, chap. 527.

To sustain an indictment for publishing an indecent paper the indictment should contain a general description of the print and its tendency, but need not copy its language. *People v. Hallenbeck*, 52 How. Pr. 502; *Com. v. Sharpless*, 2 Serg. & R. 92; *Com. v. Holmes*, 17 Mass. 336.

So of pictures, they need not be particularly described. *State v. Pennington*, 2 Lea (Tenn.), 506.

"The question whether a publication is obscene does not depend upon its being true or false, but upon its tendency to inflame the passions and debauch society." That which offends modesty, is indecent and lewd, and tends to the creation of lascivious desires, is obscene; and this tendency is matter of fact to be judged by the jury. A book purporting to give medical instruction may be amenable to the law as an obscene publication when its tendency is rather to debauch society for the purpose of gain than to benefit the public. *Com. v. Landis*, 8 Phila. 458.

In *U. S. v. Bennett*, 16 Blatchf. 338, the court say: "It is not a question whether it would corrupt the morals and tend to deprave your minds or the minds of every person; it is a question whether it tends to deprave the minds open to such influences and into whose hands a publication of this character might come. It is within the law if it would suggest impure and libidinous thoughts in the young and inexperienced."

In *Queen v. Hicklin*, L. R., 8 Q. B. 360, Cockburn, L. C. J., said: "The test of obscenity is this: Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

Judge Clark said (*U. S. v. Heyward*): "A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency."

In *U. S. v. Stenker*, 32 Fed. Rep. 693, the court say: "No matter what the motive or purpose for which they were sent, whether in the real or supposed interests of science, philosophy or morality, if they are of an obscene character you should find the defendant guilty."

The question of obscenity or indecency is one falling within the range of ordinary intelligence, and so does not require an expert to determine, and his testimony is incompetent. On the trial defendant called as a witness an artist and asked him if there was a distinguishing line, as understood by artists, between pure and obscene and indecent art; this was objected to and excluded. *Held*, no error; that if the question was intended simply to bring out the fact that pictures might be either decent or indecent, and that the canons of pure art would accept those of one class and reject the others, it was properly rejected as an attempt to prove a self-evident proposition; if the question was intended to be followed by proof that according to the artist's standard the photographs in question were not obscene or indecent, it was properly rejected,

as such evidence was incompetent. *Also held*, that the intent of defendant in selling the photographs was not an element in determining his guilt, and evidence of intent was incompetent. *People v. Muller*, 96 N. Y. 408; affirming 83 Hun, 209.

Medical works generally disseminated having the effect to debauch society, may be obscene within the act. *Reg. v. Hicklin*, L. R., 8 Q. B. 860; *Reg. v. Grey*, 4 Fost. & Fin. 73. And that the object was philanthropical or scientific is no defense. *State v. Brown*, 27 Vt. 619.

Exhibitions embrace disgusting and offensive objects, such as unnatural and monstrous birth; *Knowles v. State*, 8 Day, 103; *Com. v. Holmes*, 17 Mass. 836; *Com. v. Sharpless*, 2 Serg. & R. 91; *Harring v. Walround*, 2 Chan. Cas. 110; disgusting prints, *Reg. v. Grey*, 4 Fost. & Fin. 73; pictures, *McNair v. People*, 98 Ill. 441; *Reg. v. Saunders*, 13 Cox C. C. 116; even though the pictures are not immoral, *Com. v. Landis*, 8 Phila. 453. It is enough exposure to public view in a public place, *State v. Roper*, 1 Dev. & Bat. 208; or that it is such as to render it probable that it could be seen by the public, *Reg. v. Elliot*, Leigh & Cave, 103; and does not depend on the number of persons to whom the exposure is made. *State v. Millard*, 13 Vt. 574.

§ 318. **Indecent articles, etc.**—A person who sells, lends, gives away, or in any manner exhibits or offers to sell, lend or give away, or has in his possession with intent to sell, lend or give away, or advertises, or offers for sale, loan or distribution, any instrument or article, or any recipe, drug or medicine for the prevention of conception, or for causing unlawful abortion, or purporting to be for the prevention of conception, or for causing unlawful abortion, or advertises, or holds out representations that it can be so used or applied, or any such description as will be calculated to lead another to so use or apply any such article, recipe, drug, medicine or instrument, or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such an instrument, article, recipe, drug or medicine can be purchased or obtained, or who manufactures any such instrument, article, recipe, drug or medicine, is guilty of a misdemeanor, and shall be liable to the same penalties as provided in section three hundred and seventeen of this Code.

§ 319. **Mailing, carrying obscene print, etc.**—A person who deposits, or causes to be deposited, in any post-office within the state, or places in charge of an express company, or of a common carrier, or other person, for transportation, any of the

articles or things specified in the last two sections, or any circular, book, pamphlet, advertisement, or notice relating thereto, with the intent of having the same conveyed by mail or express, or in any other manner, or who knowingly or willfully receives the same, with intent to carry or convey, or knowingly or willfully carries or conveys the same, by express, or in any other manner except in the United States mail, is guilty of a misdemeanor.

§ 320. **Warrant to sheriff to search, etc.**—A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of this chapter, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal or police officer within the county, directing him to search for, seize and take possession of any of the articles specified in this chapter, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant, to the district attorney of the county, who must, upon the conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had.

§ 321. **Physician's instruments.**—An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this chapter. The supplying of such articles to such physicians or by their direction, or prescription, is not an offense under this chapter.

§ 322. **Keeping disorderly houses, etc.**—A person who keeps a house of ill-fame or assignation of any description, or a house or place for persons to visit for unlawful sexual intercourse, or for any lewd, obscene, or indecent purpose, or disorderly house, or a house commonly known as a stale beer dive, or any place of public resort by which the peace, comfort, or decency of a neighborhood is habitually disturbed, or who, as agent or owner, lets a building or any portion of a building, knowing that it is

intended to be used for any purpose specified in this section, or who permits a building or a portion of a building to be so used, is guilty of a misdemeanor. This section shall be construed to apply to any part or parts of a house used for any of the purposes herein specified.

Mr. Bishop says (1 Crim. Law, 7th ed., § 1106): "The term 'disorderly house' has a wide meaning. It includes bawdy houses, common gaming houses, and places of a like character, to which people promiscuously resort for purposes injurious to the public morals, or health, or convenience, or safety; all of which are indictable as public nuisances. But evidently the term does not cover every sort of nuisance indicated by the word 'house.' It cannot include a house kept in so filthy a condition as to be, therefore, indictable. Consequently it is better restricted in meaning, and it sometimes is, to denote a house or other like place in which people abide, or to which they resort, disturbing the repose of the neighborhood." See 10 Crim. Law Mag. 513.

Offices kept for unlawful sale of passage tickets are disorderly houses. § 621, *post*.

An opera house may be so kept as to become a disorderly house within the meaning of this section. *Berry v. People*, 1 N. Y. Cr. Rep. 43; affirmed in Ct. of App., 1879.

A canvass tent. *Killman v. State*, 2 Tex. App. 223; 26 Am. Rep. 433.

A house is disorderly which tends to public annoyance, although only one person may actually have been disturbed. *Com. v. Hopkins*, 133 Mass. 381; 43 Am. Rep. 527.

It is not an essential element of the offense of keeping a disorderly house that the public should be disturbed by noise; the keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house. *King v. People*, 83 N. Y. 587. In that case, after the court had in its charge defined the offense of keeping a gambling house, prisoner's counsel asked him to charge that the playing of cards in defendant's house did not, of itself, make it a gambling house. The court, in reply, said: "Except that it is the gambling for money that makes it a disorderly house." *Held*, no error.

Keeping a bawdy house was a misdemeanor at common law. 2 Whart. Crim. Law, § 1449; *People v. Miller*, 3 N. Y. Cr. Rep. 480; 38 Hun, 83; *People v. Sadler*, 97 N. Y. 146; 3 N. Y. Cr. Rep. 473; *People v. Erwin*, 4 Denio, 129; *Louvenstein v. People*, 45 Barb. 299; *King v. People*, 83 N. Y. 590.

In *Herzinger v. State*, 70 Md. 278, the court say: "The keeping of a bawdy house constitutes at common law a common nuisance, 'not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness.' 1 Hawk. P. C., bk. 1, chap. 74, § 1; Rosc. Crim. Ev. (10th ed.) 823. The gist of the offense consists in keeping the house for lewd and unchaste purposes, and not in the reputation of the house. *Henson v. State*, 62 Md. 231, 234. And it is not necessary that the indecency or disorderly conduct of the frequenters of the house should be perceptible from the exterior of the house. *Reg. v. Rice*, L. R., 1 Cr. Cas. Res. 21; 2 Whart. Crim. Law (7th ed.), § 2392. And though the charge in the

indictment is made in general terms, yet evidence may be given of particular facts, and of the time of such facts, the offense in its nature being cumulative. *Rosc. Crim. Ev.* (10th ed.) 823. And in the trial of such cases it is well settled that evidence of the bad character for chastity of the women who frequent the house is admissible, as showing or tending to show the purpose for which the house is used. *Com. v. Gannett*, 1 Allen, 7; *State v. Boardman*, 64 Me. 523; *Sparks v. State*, 59 Ala. 82." See, also, on last point, *King v. State*, 17 Fla. 190.

The common-law remedy by indictment against a person keeping a bawdy house was not abolished or superseded by section 899, Code Crim. Proc. *People v. Sadler*, 97 N. Y. 146.

Indictment need not allege that peace of neighborhood was actually disturbed, but only that the house was a house of prostitution and openly kept as such. *Barnesciotta v. People*, 10 Hun, 137; 69 N. Y. 612; *King v. People*, 83 id. 587.

In an indictment for keeping a disorderly house, it is unnecessary to allege the character of the persons frequenting it. *State v. Dame*, 60 N. H. 479; 49 Am. Rep. 331.

"Where the indictment charges in a single count that the house was kept as a bawdy house, and as a disorderly house, and as a tippling house, and as a dancing house, it is not, therefore, multifarious, and if sufficient of the allegation is proved to constitute an offense, there may be a conviction." *Bishop Crim. Proc.*, § 106; *Com. v. Kimball*, 7 Gray, 328; *State v. Hanchett*, 36 Conn. 85; *State v. Fletcher*, 18 Mo. 425.

When the house of a person is the resort of prostitutes, plying their vocation with his knowledge, this constitutes a disorderly house. *King v. People*, 83 N. Y. 588; *People v. Carey*, 4 Park. 238; *Jacobowski v. People*, 6 Hun, 524; 64 N. Y. 659.

A house of assignation is a bawdy house though no prostitutes live there. *People v. Rowland*, 1 Wheeler Crim. Cas. 286.

In *Troutman v. State*, 49 N. J. L. 33, it was held that the agent of the owner renting a house knowingly for the purpose of a brothel may be indicted as the keeper of such house. See, also, *Lowenstein v. People*, 54 Barb. 299; *People v. Erwin*, 4 Denio, 129; *U. S. v. Gray*, 2 Cranch C. C. 675; *Com. v. Harrington*, 3 Pick. 26.

Evidence of the general reputation of the house is incompetent to prove the charge. 2 *Bish. Crim. Proc.* (3d ed.), §§ 112-113; *People v. Mauch*, 24 How. Pr. 276; *Handy v. State*, 63 Miss. 207; 56 Am. Rep. 803; *Henson v. State*, 62 Md. 231; 50 Am. Rep. 204; 5 *Crim. L. Mag.* 693; *Wooster v. State*, 55 Ala. 217.

In *State v. Smith*, 29 Minn. 195, the court say: "Upon a trial on indictment for keeping a house of ill-fame, resorted to for purposes of prostitution, evidence of the general reputation of the house is competent. The term 'house of ill-fame' is no doubt a mere synonym for 'bawdy house,' having no reference to the fame of the place, but denoting the fact. Hence we do not assent to the position taken by counsel for the state that it is necessary to prove the repute of the house. Yet, in matter of evidence, proof of the fact may be aided by the fame. 1 *Bish. Crim. Law*, § 1088; 2 *Whart. Crim. Law*, § 1451;

O'Brien v. People, 28 Mich. 213; *State v. Brunell*, 29 Wis. 435; *State v. McDowell*, Dudley (S. C.), 346; *Morris v. State*, 38 Tex. 603. We are aware that there is some conflict of authority as to the competency of such evidence, and that its admission might seem in violation of the rule excluding hearsay evidence. The weight of authority, however, seems to be in favor of its competency. The difficulty in obtaining direct evidence in such cases has, perhaps, rendered its admission a necessity; and its receipt is not likely to operate unjustly, for it very rarely, if indeed ever, occurs that a place acquires the general reputation of being a bawdy house without being one in fact. We do not hold, however, that evidence of general reputation alone would be sufficient to establish the character of the place. All that it is necessary to decide at present is that evidence of general reputation is competent in aid of other evidence as to the character of the house. In this case there was direct evidence of the lewd character and conduct of the inmates of the house, and of specific acts of lewdness on their part. The court admitted in evidence, against the objection of defendant, a lease of the alleged bawdy house from the owner of the property to defendant, and executed by both parties. This, taken in connection with the other facts, also shown in evidence, that defendant was personally present and living in the house, and exercising acts of control over it and its inmates, was competent evidence tending to show that she was the keeper of the house. Evidence of the personal lewd and indecent acts of defendant herself in the house, in presence of inmates and visitors, was competent as tending to show her knowledge of the character of the house, and her assent to its use as a house of ill-fame. *State v. Wells*, 46 Iowa, 662; *Mahalovitch v. State*, 54 Ga. 217."

Though a house of ill-fame is a public and common nuisance, it may not be lawfully destroyed in abating it. *Ely v. Suprs. of Niagara*, 36 N. Y. 297; *Moody v. Supervisors*, 46 Barb. 659; *Lawton v. Steele*, 119 N. Y. 239.

In a suit against a surety on a written lease, defendant offered to show that the premises were hired to be used for illegal and immoral purposes, and that the agent of the landlord knew of it. *Held*, that, as the lease showed nothing from which an illegal purpose could be implied, the evidence was properly refused, the fact that the agent knew of the purpose, being immaterial, unless brought to the knowledge of the landlord, in this case, where the act of such leasing would be criminal, under this section. *Arras v. Richardson*, 5 N. Y. Supp. 755.

CHAPTER VIII

LOTTERIES.

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§ 323. "Lottery" defined. — A lottery is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle or gift enterprise, or by some other name.

This section defines "lottery" with all needful accuracy and precision. *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 138.

The word "lottery" has no technical legal meaning. It must be construed in the popular sense and with a view of remedying the mischief intended to be prevented. *Wilkinson v. Gill*, 74 N. Y. 66; 30 Am. Rep. 264; *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 138; *Kohn v. Koehler*, 96 N. Y. 367; *Kel-lovestone Kit v. State*, 88 Ala. 196; 16 Am. St. 38; 41 Alb. L. J. 392. See, also, Bish. Stat. Crim. (2d ed.), § 950.

A lottery is a scheme by which a result is reached by some action or means taken, in which result man's choice, or will, has no part, and which human reason, foresight, sagacity or design, cannot enable him to know or determine until the same has been accomplished. *People v. Elliott*, 74 Mich. 264; 16 Am. St. 640; 3 L. R. A. 403, note.

A concert enterprise, got up for the purpose of raising funds for charitable uses, each ticket to which by its express terms entitles the bearer to admission to the concert and to whatever gift may be awarded to its number, is a lottery. *Negley v. Devlin*, 12 Abb. (N. S.) 210.

The publication of an offer of a gold watch to the person buying goods at the defendant's store to the amount of fifty cents, and guessing nearest the number of beans in a glass globe in the window, is an advertisement of a lottery. *Hudelson v. State*, 94 Ind. 426; 48 Am. Rep. 171.

Proprietors of a newspaper offered as an inducement to subscription, and gratuitously gave to every new subscriber a ticket entitling him to participate in a distribution of prizes, and the distribution was made by lot. *Held*, a lottery. *State v. Mumford*, 73 Mo. 647; 39 Am. Rep. 532.

Pool-selling is not punishable as a "lottery." *People v. Reilly*, 50 Mich. 384; 45 Am. Rep. 47.

The sale of "prize candy" in boxes, each box being represented to contain a prize of money or jewelry, and the purchaser selecting his box in ignorance of its contents. *Held*, a lottery. *Holoman v. State* 2 Tex. Ct. App. 610; 28 Am. Rep. 439; *Hull v. Ruggles*, 56 N. Y. 424.

The distribution of prizes by chance is a lottery. *Rolfe v. Delmar*, 7 Robt. 80.
 Where several persons put money in equal amounts upon a round board,

numbered around the rim, and each in turn whirls a hand fastened in the center, the one at whose whirl the hand registers the highest number on the rim of the board taking all the money on the board, the owner of the board sometimes putting up money, and sometimes charging a small sum, to be paid by the winner, for the use of the board; this does not constitute a lottery. *Buckalew v. State*, 62 Ala. 834; 34 Am. Rep. 22.

Playing "policy" is a lottery. *Wilkinson v. Gill*, 74 N. Y. 63; *Grover v. Morris*, 73 id. 473; *Almy v. McKinney*, 5 State Rep. 267.

Where one chose a number and paid a certain sum, and the seller drew an envelope from a box full, containing a slip with many numbers on it, and if the number chosen was on the slip, the buyer received a multiple of the sum paid, greater or less according to agreement, and if not he lost what he had paid. *Held*, a lottery. *Com. v. Wright*, 137 Mass. 250; 50 Am. Rep. 306.

The Austrian government to obtain a loan issued bonds for principal and interest, and any prize in money which the holder might become entitled to under a drawing to be had as provided therein. *Held*, not an illegal lottery. *Kohn v. Koehler*, 96 N. Y. 362; 48 Am. Rep. 628; followed in *Matter of Shobert* 70 Cal. 632; 59 Am. Rep. 432; 8 Crim. Law Mag. 647. *Contra*, *Ballock v. State* (Md.), 22 Chic. Leg. News, 395. The court say: "The case of *Kohn v. Koehler*, 96 N. Y. 362, was a civil suit under the New York statute to recover double the amount paid by plaintiff for a bond exactly like the one here involved, and does decide that it did not fall under the condemnation of the New York statute; and *Shobert's Case*, 70 Cal. 632, follows it in construing the California statute. We have examined the statutes of those states, and do not think those cases can or ought to control us in the construction of our statute which is so essentially different from both the New York and the California law. Even upon the New York statute we think the reasoning of Judge Davis in the supreme court in *Kohn v. Koehler*, 21 Hun, 466-470, more convincing and sounder than that of the appellate court which reversed the supreme court's decision in the case; and we approve the reasoning of the supreme court."

The object of sections 323 and 325 of the Penal Code is to prevent every thing in the way of a lottery, raffle or gift enterprise, or kindred project, by whatever name it may be known, whether for children or adults, or designed for any particular season of the year, and however innocent in character and effect it may be assumed to be by its contriver. *People v. Runge*, 3 N. Y. Cr. Rep. 85.

Defendants, being wholesale confectioners, sold to one of the witnesses for the prosecution, a compartment box, accompanied by one hundred and fifty pieces of chewing gum, each piece being numbered, and according to the description given by the defendants to the purchaser at the time of the sale, intended to be sold to children for a penny a piece, each one of which drew a prize, contained in said box, consisting of an egg, small or large, according to the number, the whole seeming to form an Easter device. One of the defendants admitted, at the time, that they had bought the gum, and manufactured and arranged the box themselves, and that they had made large sales thereof; the contrivance so purchased by the witness being exhibited to the jury. *Held*, sufficient evidence to support an indictment that the additional proof that the offense was committed, other than defendant's confession, required by section

895, was to be found in the said purchase and the production of the contrivance before the jury; also, that the indictment was supported, though it appeared that the purchase by the witness for the people, was made only for the purpose of proving the offense, and with no intention of using the contrivance as a lottery; and that, in any event, the evidence was sufficient to support the indictment for assisting in contriving a lottery. *People v. Runge*, 3 N. Y. Cr. Rep. 85.

§ 324. Lottery declared a public nuisance. — A lottery is unlawful and a public nuisance.

See *Matter of Blanchard*, 9 Nev. 101; *Goodrich v. Houghton*, 29 State Rep. 907.

The right to suppress lotteries is governmental, to be exercised at all times by those in power at their discretion. *Stone v. State*, 101 U. S. 814; *Moore v. State*, 48 Miss. 147; 12 Am. Rep. 367.

The grant of the charter of the Louisiana Lottery Company being contained in the constitution of that state, the legislature cannot contravene it, although the subject-matter of such contract may have been embraced within the police power of the state. *New Orleans v. Houston*, 119 U. S. 265. See, also, Bish. Stat. Crimes (2d ed.), § 957.

"A widespread custom of indulgence in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste and idleness. It cultivates a gambling spirit, and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy." Peckham, J., in *People v. Gillson*, 109 N. Y. 404.

§ 325. Contriving, drawing, etc., lottery. — A person who contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing the same, is punishable by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both.

See notes to section 323, *ante*.

§ 326. Selling lottery tickets. — A person who sells, gives, or in any way whatever furnishes or transfers, to or for another, a ticket, chance, share or interest, or any paper, certificate or instrument, purporting to be or to represent a ticket, chance, share or interest, in or dependent upon the event of a lottery, to be drawn within or without of this state, is guilty of a misdemeanor.

See § 334, *post*; *Goodrich v. Houghton*, 29 State Rep. 907.

The state may prohibit the sale, within its jurisdiction, of tickets in a lottery organized in another state, and which is lawful under the laws of that state; and a sale of such tickets is a violation of this section. *People v. Noelke*, 96 N. Y. 137; 46 Am. Rep. 218; *State v. Moore*, 64 N. H. 9; 56 Am. Rep. 478.

The indictment need not set forth the purpose for which the lottery was set on foot, *i. e.*, that it was for the purpose of setting up for sale, or disposing of any species of property. *People v. Noelke*, 94 N. Y. 137.

An indictment which charges that the defendant "did willfully, unlawfully and knowingly sell, vend and cause to be sold and vended what are commonly known and called lottery policies, the particulars whereof are unknown to the jurors aforesaid, and did then and there sell and vend divers of such lottery policies to divers persons, to the jurors aforesaid unknown," is sufficient. *Pickett v. People*, 8 Hun, 83; affirmed, 67 N. Y. 609. See, also, *Com. v. Bierman*, 18 Bush, 345.

In *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 218, defendant was called as a witness in his own behalf; on cross-examination he was asked whether he had been engaged in the business of lottery tickets, and lottery policies; also, whether he had been tried and convicted of violating the law prohibiting the sending of lottery circulars through the mail. These questions were objected to, and objections overruled. *Held*, no error. S. P., *People v. Hooghkerk*, 96 N. Y. 149; 67 How. Pr. 264.

One who purchases a lottery ticket for the purpose of detecting and punishing the vendor, not with intent to aid in the commission of the offense, is not an accomplice. *People v. Noelke*, 96 N. Y. 137; *People v. Emerson*, 6 N. Y. Cr. Rep. 157.

§ 327. Advertising lotteries.—A person who, by writing or printing, or by circular or letter, or in any other way, advertises or publishes an account of a lottery, whether within or without the state, stating how, when or where the same is to be, or has been, drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, is guilty of a misdemeanor.

This statute is constitutional. *Hart v. People*, 26 Hun, 396.

Publishing an account of a lottery to be drawn in another state is indictable under the statute. *People v. Charles*, 3 Denio, 212; 1 N. Y. 180.

A contract made in this state to advertise a lottery in other states, in the absence of proof that such advertisement is in violation of the laws of those other states, will not be held illegal. *Ormes v. Dauchy*, 82 N. Y. 443; 37 Am. Rep. 583. But, see § 334, *post*.

One may be guilty of advertising a lottery, though he is not the proprietor. *State v. Kaub*, 15 Mo. App. 433.

A stockholder of a corporation publishing a newspaper cannot be held criminally liable for publishing an illegal advertisement therein unless he knew of its insertion. *People v. England*, 27 Hun, 139.

§ 328. Offering property for disposal dependent upon the drawing of any lottery.—A person who offers for sale or distribution, in any way, real or personal property, or any interest therein, to be determined by lot or chance, dependent

upon the drawing of a lottery within or without this state, or who sells, furnishes or procures, or causes to be sold, furnished or procured, in any manner, a chance or share, or any interest in property offered for sale or distribution in violation of this chapter, or a ticket or other evidence of such a chance, share or interest, is guilty of a misdemeanor.

§ 329. Keeping office, etc., for registry. — A person who opens, sets up, or keeps, by himself or another person, an office or other place for registering the numbers of tickets in a lottery within or without this state, or for making, receiving or registering any bets or stakes for the drawing, or result of such a lottery, or who advertises or in any way publishes any account of an opening, setting up, or keeping of such an office or place, is guilty of a misdemeanor.

See *People v. Jackson*, 3 Denio, 101.

§ 330. Insuring lottery tickets, etc. — A person who insures, or receives any consideration for insuring, for or against the drawing of a ticket, share or interest in a lottery, or of a number of such a ticket, share or interest, or who receives any valuable consideration upon an agreement to pay money, or deliver property, in the event that a ticket, share or interest, or a number of such a ticket, share or interest in a lottery, shall prove fortunate or unfortunate, or shall be drawn or not drawn in a particular way or in a particular order, or who promises or agrees, or offers to pay money, or to deliver property, or to do, or forbear to do, anything for the benefit of any person, with or without consideration, upon any accident or contingency dependent on the drawing thereof, or of any number or ticket therein, is guilty of a misdemeanor.

The insurance of a lottery ticket is indictable under the statute, though the insurer acted for another merely. *Kenney's Case*, 3 C. H. Rec. 53; *Baldwin's Case*, id. 96.

§ 331. Advertising offers to insure lottery tickets. — A person who, by writing or printing, or by circular or letter, or in any other way, advertises or publishes an offer, notice or proposition, in violation of the last section, is guilty of a misdemeanor.

§ 332. Property offered for disposal in lotteries forfeited.—All property offered for sale or distribution, in violation of the provisions of this chapter, is forfeited to the people of this state, as well before as after the determination of the chance on which the same was dependent. And it is the duty of the respective district attorneys to demand, sue for and recover, in behalf of the people, all property so forfeited, and to cause the same to be sold when recovered, and to pay the proceeds of the sale of such property, and any moneys that may be collected in any such suit, into the county treasury for the benefit of the poor.

No order of arrest will be granted in action brought to recover under this section. *People v. Phillips*, 30 Hun, 558.

§ 333. Letting building for lottery purposes.—A person who lets, or permits to be used any building or portion of a building, knowing that it is intended to be used for any of the purposes declared punishable by this chapter, is guilty of a misdemeanor.

A lease of premises to be used for the sale of lottery tickets is void, and the rent reserved thereon cannot be recovered. *Edelmuth v. McGarren*, 4 Daly, 467. See *Michael v. Bacon*, 8 Am. Rep. 138.

§ 334. Lotteries out of this state.—The provisions of this chapter are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

See cases cited under §§ 326, 327, *ante*.

§ 335. Advertisements by persons out of this state.—The provisions of sections three hundred and twenty-seven and three hundred and thirty-one are applicable, whenever the advertisement was published, or the letter or circular sent or delivered through or in this state, though the person causing or procuring the same to be published, sent or delivered, was out of the state at the time of so doing.

§ 335A. Gift sales of food.—No person shall sell, exchange or dispose of any article of food, or offer or attempt to do so upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject

of the sale or exchange, is or is to be delivered or received or in any way connected with or a part of the transaction as a gift, prize, premium or reward to the purchaser. Any person violating any of the provisions of the foregoing section shall be deemed guilty of a misdemeanor and, in addition thereto, shall be liable to a penalty of twenty-five dollars, to be recovered with costs, by any person suing therefor in his own name.

This section was declared to be unconstitutional in *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

CHAPTER IX.

GAMING.

SECTION 336. Keeping gambling apparatus in certain places.

- 337. Punishment.
- 338. Gambling apparatus declared a nuisance
- 339. Winning at play by fraudulent means.
- 340. Exacting payment of money won at play.
- 341. Winning or losing upward of twenty-five dollars.
- 342. Witness' privilege.
- 343. Keeping gambling establishments.
- 344. Common gambler, etc.
- 345. Seizure of gambling implements authorized.
- 346. Such implements to be destroyed or delivered to district attorney.
- 347. Such implements to be destroyed upon conviction.
- 348. Persuading another person to visit gambling places.
- 349. Certain officers directed to prosecute offenses under this chapter.
- 350. Duty of masters to suppress gambling on board their vessels.
- 351. Bets, etc., on horse races, etc.
- 352. Racing of animals for stake.

§ 336. Keeping gambling apparatus in certain places.—

It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at any of the following places:

1. Within a building, or the appurtenances or grounds connected with any building, in which a court of justice usually holds its

sessions; or a building, any part of which is usually occupied by a religious corporation, or an incorporated benevolent, charitable, scientific or missionary society, or an incorporated academy, high school, college or other institution of learning, a library company, or building and mutual loan company;

2. Within any building, or the appurtenances connected with any building, while votes are received or canvassed therein at any election for an officer of this state, or of the United States, or while any public meeting is held therein;

3. Within the distance of one mile from the grounds upon which any training, review, drill or exercise of a military organization, created or permitted by the laws of this state, is proceeding, or upon which any public fair, exhibition, exercise or meeting is held in the open air; or,

4. Within any vessel lying in, or navigating, any of the waters of this state; or owned or navigated by, or for account of any corporation created by the laws of this state.

Gambling is a crime. *Steinhart v. Farrell*, 3 State Rep. 292.

The keeping of gambling instruments in a house, and permitting others to use them, is indictable. *Lyner's Case*, 5 C. H. Rec. 156.

A shuffle-board kept in a grocery is within the statute. *Cascadden's Case*, 2 C. H. Rec. 58; *Lowerey v. State*, 1 Mo. 722. In *State v. Bishop*, 8 Ired. (N. C.) 266, it was held that shuffle-board is not a game of chance.

The provisions of the Revised Statutes giving a remedy to the loser of money lost in gaming, are not inconsistent with sections 336 and 340 of the Penal Code, and are not repealed by sections 725 and 726 of said Code. *Rockwood v. Oakfield*, 2 State Rep. 331. See 8 Am. and Eng. Encyc. of Law, 1088, *et seq.*; 33 Am. Dec. 134; Bish. Stat. Crimes (2d ed.), § 847, *et seq.*; 5 Crim. Law Mag. 524; 4 Lawson Crim. Def. 752.

In most circumstances and under most statutes gaming is any sport or play carried on between two or more persons, depending on skill, chance, or the transpiring of an unknown future event, on the result of which some valuable thing is, without other consideration, to be transferred from the one to the other, or which in its course or consequences involves some other thing demoralizing or unlawful. Bish. Stat. Crimes (2d ed.), § 861.

Playing games for the cigars, beer, etc., is gambling. *Hitchins v. People*, 39 N. Y. 454; Book VIII (Reprint), 732, note; *State v. Wade*, 43 Ark. 77; 51 Am. Rep. 560. So, playing billiards for oysters, beer or cigars. *State v. Bishop*, 39 Iowa, 42. But not the mere hire of the table. *Brenniger v. Belvidere*, 44 N. J. L. 350; *Harbaugh v. People*, 40 Ill. 294; *Blowett v. State*, 34 Miss. 606; *People v. Sergeant*, 8 Cow. 139. *Contra*, *State v. Book*, 41 Iowa, 550; 20 Am. Rep. 609; *State v. Leighton*, 3 Fost. 167; *Ward v. State*, 17 Ohio St. 32; *Hamilton v. State*, 17 Ind. 586; *State v. Records*, 4 Harr. 554; *Alexander v. State*, 6 Crim. Law Mag. 506.

A bond given by a tavern-keeper under the act of 1857, prohibiting the keeping of "a gambling table of any description," is broken where a billiard table is kept for use in such tavern. *People v. Harrison*, 28 How. 347.

A horse race is a "gambling device." *Joseph v. Miller*, 7 N. Mex. 621.

But not a gun and target. *State v. Bryant*, — Mo. —

"Book-making" is another name for gambling. *Murphy v. Board of Police*, 11 Abb. N. C. 340.

Poker is a game of chance. *Kennow v. King*, 2 Mont. 437.

So is a horse race bet on by a "Paris-mutual." *Tollett v. Thomas*, L. R., 6 Q. B. 514.

So is a raffle with dice. *Long v. State*, 22 Tex. Ct. App. 194; 58 Am. Rep. 688.

An election is not a game. *Schlusser v. Smith*, 93 Ind. 88.

Nor a dog race. *Hirst v. Molesbury*, L. R., 6 Q. B. 180.

But a horse race is. *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110; *Garrison v. McGregor*, 51 Ill. 473; *Dyer v. Benson*, 69 Ga. 609; *Wade v. Deming*, 9 Ind. 35; *Ellis v. Beale*, 18 Me. 337.

So is base-ball. *People v. Weithoff*, 51 Mich. 203; 47 Am. Rep. 557.

So is blowing a dart at a target, the entrance fee being to buy a dead-rabbit, the prize (Cockburn, Ch. J., doubting). *Bewe v. Harston*, 3 Q. B. Div. 454; 28 Eng. Rep. 385.

A pool-room is a gaming-room. *People v. Weithoff*, 51 Mich. 203; 47 Am. Rep. 557; 4 Crim. Law Mag. 682.

Trotting horses for a prize is not gaming. *Porter v. Day*, — Wis. —. *Contra, Cornly v. Hillegas*, 94 Penn. St. 132; 39 Am. Rep. 774; *Harris v. White*, 81 N. Y. 532.

Dealing in options is not gaming or betting. *Shaw v. Clark*, 49 Mich. 494; 43 Am. Rep. 474; *Story v. Solomon*, 71 N. Y. 420.

A wager, that an execution cannot be collected, is not upon a game. *Boughner v. Meyer*, 5 Col. 71; 40 Am. Rep. 139.

Poker is not a game "like faro, keno," etc. *Nuckolls v. Com.*, 32 Gratt. 884.

Backgammon is not a "game played with dice." *Wetmore v. State*, 55 Ala. 198.

Playing cards for mere amusement is not gaming. *Ansley v. State*, 36 Ark. 67; 38 Am. Rep. 29.

So of "pigeon-hole" in sport. *Wolz v. State*, 33 Tex. 881.

Fighting-cocks are not gaming apparatus. *Coolidge v. Choate*, 11 Metc. 79.

Gaming table is any table used for gaming. *Toney v. State*, 61 Ala. 1.

But not a common table on which dice are thrown for drinks or money. *Whitney v. State*, 10 Tex. Ct. App. 377.

§ 337. **Punishment.** — A person who knowingly violates the last section is guilty of a misdemeanor.

§ 338. **Gambling apparatus declared a nuisance.** — An article or apparatus maintained or kept in violation of section three hundred and thirty-six, is a public nuisance.

See *post*, § 385.

§ 339. **Winning at play by fraudulent means.** — A person who by any fraud, or false pretense whatsoever, while playing at any game, or while having a share in any wager played for, or while betting on the sides or hands of such as play, wins or acquires to himself, or to any other, a sum of money or other valuable thing, is guilty of a misdemeanor.

§ 340. **Exacting payment of money won at play.** — A person who exacts or receives from another, directly or indirectly, any money or other valuable thing, by reason of the same having been won by playing at cards, faro, or any other game of chance, or any bet or wager whatever upon the hands or sides of players, forfeits five times the value of the money or thing so exacted or received, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

§ 341. **Winning or losing upward of twenty-five dollars.** — A person who wins or loses at play or by betting, at any time, the sum or value of twenty-five dollars or upwards, within the space of twenty-four hours, is punishable by a fine not less than five times the value or sum so lost or won, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

See *Arrieta v. Morrissey*, 1 Abb. (N. S.) 439; *Langworthy v. Bromly*, 29 How. Pr. 92.

§ 342. **Witness' privilege.** — No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding.

See *Steinhart v. Farrell*, 3 State Rep. 292.

§ 343. **Keeping gambling establishments.** — Any corporation or association or the officers thereof, or any copartnership or individual, who shall keep a room, shed, tent, tenement, booth, building, float or vessel or any part thereof, to be used for gamb-

ling or for any purpose or in any manner forbidden by this chapter, or for making any wagers or bets made to depend upon any lot, chance, casualty, unknown or contingent event or on the future price of stocks, bonds, securities, commodities or property of any description whatever, or for making any contract or contracts for or on account of any money, property or thing in action, so bet or wagered, or being the owner or agent knowingly lets or permits the same to be so used, is guilty of a misdemeanor. This section shall not be extended so as to prohibit or in any manner affect any insurance made in good faith for the security or indemnity of the party insured and which is not otherwise prohibited by law nor to any contract on bottomry or *respondentia*. And nothing in this section shall be construed to repeal or otherwise affect the provisions of chapter four hundred and seventy-nine of the laws of one thousand eight hundred and eighty-seven, entitled "An act prescribing the period in each year during which and the terms under which racing may take place upon the grounds of an association incorporated for the purpose of improving the breed of horses and suspending the operation of certain sections of the Penal Code."

Keeping a room where wagers are made as to the fluctuations of the price of stocks bought and sold in the New York Stock Exchange as indicated by a stock quotation ticker, no violation of this section. *People v. Todd*, 51 Hun, 446.

§ 344. **Common gambler, etc.**— A person who is the owner, agent or superintendent of a place, or of any device or apparatus for gambling; or who hires, or allows to be used a room, table, establishment or apparatus for such a purpose; or who engages as dealer, game-keeper, or player in any gambling or banking game, where money or property is dependent upon the result; or who sells or offers to sell what are commonly called lottery policies, or any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who indorses or uses a book or other document, for the purpose of enabling others to sell, or offer to sell, lottery policies, or other such writings, papers or documents, is a common gambler, and punishable by imprisonment for not more than two years, or by a fine not exceeding one thousand dollars, or both.

The words "common gambler" as used in Laws of 1851, page 943, and Laws of 1857, page 204, section 9, are a general nomenclature under which to class and designate persons guilty of various specific offenses, and not bearing upon the punishment to which the offenders may be subjected, or degree of crime to which the offenses belong. *People v. Borges*, 6 Abb. 182.

Sufficiency of indictment for selling lottery policies. *Dunn v. People*, 27 Hun, 272.

It is proper to show by one familiar therewith, what a "lottery policy" is. *People v. Emerson*, 6 N. Y. Cr. Rep. 157.

In *People v. Emerson*, 6 N. Y. Cr. Rep. 157, it was held that on the trial of an indictment for the keeping of a room for selling lottery policies and for selling of writings in the nature of insurance on the drawing of a lottery, evidence is admissible that in defendant's office a witness saw papers similar in appearance to those charged to have been sold by defendant.

§ 345. Seizure of gambling implements authorized. — A person, who is required or authorized to arrest any person for a violation of the provisions of this chapter, is also authorized and required to seize any table, cards, dice or other apparatus or article, suitable for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person arrested is required to be taken.

Where an arrest for gambling is made by a justice of the peace and his attendants, and the gambling implements are also seized, the latter may be retained in the custody of the law until after trial and conviction of the gamblers; after such conviction, but not before, the implements may be destroyed under the act of 1857, chap. 569. *Willis v. Warren*, 17 How. 100; 1 Hilt. 590. See, also, Moak's Underhill Torts, 188; 18 Eng. Rep. 360; 28 id. 423.

§ 346. Such implements to be destroyed or delivered to district attorney. — The magistrate, to whom any thing suitable for gambling purposes is delivered pursuant to the last section, must, upon the examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the defendant in violation of the provisions of this chapter; and if he finds that it is of a character suitable for gambling purposes, and that it has been used by the defendant in violation of this chapter, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice may, in his opinion, require.

A statute authorized the police to seize gambling tables and gaming devices used for gambling, and made it the duty of the president of the police to cause the same to be publicly destroyed. This could be done without notice to the owner or any semblance of a judicial investigation. *Held*, unconstitutional. *Lowry v. Rainwater*, 70 Mo. 152; 85 Am. Rep. 420; 21 Alb. L. J. 72.

§ 347. Such implements to be destroyed upon conviction.— Upon the conviction of the defendant, the district attorney must cause to be destroyed every thing suitable for gambling purposes, in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney.

§ 348. Persuading another person to visit gambling places.— A person who persuades another to visit any building or part of a building, or any vessel or float, occupied or used for the purpose of gambling, in consequence whereof such other person gambles therein, is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, is liable to such other person in an amount equal to any money or property there lost by him at play, to be recovered in a civil action.

§ 349. Certain officers directed to prosecute offenses under this chapter.— It is the duty of all sheriffs, constables, police officers, and prosecuting or district attorneys, to inform against and prosecute all persons whom they have reason to believe offenders against the provisions of this chapter; and any omission so to do is punishable by a fine not exceeding five hundred dollars.

§ 350. Duty of masters to suppress gambling on board their vessels.— If the commander, owner, or hirer of any vessel or float knowingly permits any gambling for money or property on board such vessel or float, or if he does not, upon his knowledge of the fact, immediately prevent the same, he is punishable by a fine not exceeding five hundred dollars; and, in addition thereto, is liable to any party losing money or property by means of gambling in violation of this section, in a sum equal to the money or property, to be recovered in a civil action.

§ 351. **Bets, etc., on horse races, etc.**—A person who keeps any room, shed, tenement, tent, booth or building, or any part thereof, or who occupies any place upon any public or private grounds within this state, with books, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or of selling pools, and any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance, of man or beast, or upon the result of any political nomination, appointment or election; or being the owner, lessee or occupant of any room, shed, tenement, tent, booth or building, or part thereof, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for hire or reward, of any money, property or thing of value staked, wagered or pledged upon any such result, is punishable by imprisonment for one year, or by fine not exceeding two thousand dollars, or both.

See Laws 1887, chap. 479; *People v. Fisher*, 17 N. Y. Supp. 162.

Where several parties are indicted jointly under charges of registering and recording bets and wagers and they demur to the indictment upon the ground that more than one crime is charged, and that defendants were improperly joined. *Held*, that defendants by their demurrer admit the charges to be true, and the inference of law destroys the point taken that defendants should be individually charged with the offense. *People v. Kelly*, 3 N. Y. Cr. Rep. 272; 22 Week. Dig. 64.

An agreement by which complainant sent through defendant to a third party at the Sheepshead Bay race-track, a sum of money to be invested by said third party on a race to be that day run, is a violation of this section. *People, ex rel. Ottolengui, v. Barbour*, 5 N. Y. Cr. Rep. 381.

The selling of pool tickets on races during the times and at the places mentioned in the act of 1887, chap. 479, are legal, and the contract may be enforced. *Brennan v. Brighton Beach Ass'n*, 30 State Rep. 406; 4 Harr. L. Rev. 88.

In *People v. Bauer*, 87 Hun, 407, defendant having plead guilty to an indictment charging him with a violation of this section, was sentenced to pay a fine of \$750, and be imprisoned for three months. On appeal he claimed that the court could not sentence him to imprisonment for three months, but must sentence him for one year or not at all. *Held*, that even if the sentence were irregular, yet the error could not be assigned by defendant, as it was beneficial to him. That as there was no error in the conviction, the court could only reverse the sentence and remit the record to the court below to pass such sentence as the appellate court might direct.

§ 352. Racing of animals for stake. — All racing or trial of speed between horses or other animals for any bet, stake or reward, except such as is allowed by special laws, is a public nuisance; and every person acting or aiding therein, or making or being interested in any such bet, stake or reward, is guilty of a misdemeanor; and in addition to the penalty prescribed therefor, he forfeits to the people of this state, all title or interest in any animal used with his privity in such race or trial of speed, and in any sum of money or other property betted or staked upon the result thereof.

A bet among several persons upon the event of a race of their horses, whereby the owner of the winner should take the sweepstakes, is illegal and void as a wagering contract. *Gibbons v. Gouverneur*, 1 Den. 170

The fact that a horse race is to take place on an authorized race-course does not make a bet upon the race legal. *Ruckman v. Bryan*, 1 Den. 840; *Ruckman v. Pitcher*, 1 N. Y. 392.

The words "bet or stakes" in the statute which prohibits all contests of speed of animals for bets or stakes, does not include contests of speed for prizes, purses or premiums as those terms are now commonly understood. *Harris v. White*, 81 N. Y. 532.

It is not, therefore, unlawful to trot or race horses for purses, prizes or premiums at any place where by statute it is authorized, or to contract to drive a horse at a trotting race at such a place. Id.

CHAPTER X.

PAWNBROKERS.

SECTION 353. Pawnbroking without a license.

854. Refusing to exhibit stolen goods to owner.

855. Selling before time to redeem has expired and refusing to disclose particulars of sale.

§ 353. Pawnbroking without a license. — A person, who carries on the business of a pawnbroker, by receiving goods in pledge for loans at a rate of interest above that allowed by law, except by virtue of a license from a municipal corporation or other authority empowered to grant licenses to pawnbrokers, is guilty of a misdemeanor.

A pawnbroker is one whose business it is to lend money, usually in small sums upon pawn or pledge. Bouv. Dict.

§ 354. Refusing to exhibit stolen goods to owner.— A pawnbroker, or person carrying on the business of a pawnbroker, or a junk dealer, who having received any goods which have been embezzled or stolen, refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, is guilty of a misdemeanor.

§ 355. Selling before time to redeem has expired, and refusing to disclose particulars of sale. — A pawnbroker who sells any article received by him in pledge, before the time to redeem the same has expired, or who willfully refuses to disclose the name of the purchaser, and the price received by him for any article received by him in pledge, and subsequently sold, is guilty of a misdemeanor. No pawnbroker shall transact any pawnbroking business or advance any moneys upon goods pawned or received, except between the hours of seven o'clock A. M. and six o'clock P. M. on week days, excepting on Saturday, and then only between the hours of seven o'clock A. M. and twelve o'clock midnight, nor shall any business be transacted by pawnbrokers as such between the hours of twelve o'clock midnight on Saturday and seven o'clock A. M. on Monday, and every violation of these prohibitions is a misdemeanor.

In effect, as amended, May 16, 1893; Laws 1893, ch. 709.

TITLE XL

OF OTHER OFFENSES.

- SECTION 356. Misconduct of veterinary surgeons.
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383. Protecting civil and public rights.

384. Acrobatic exhibitions.

384a. Contracts in relation to Indian lands.

384b. Penalty for dealing in convict-made goods of other states without labelling.

§ 356. Misconduct of veterinary surgeons.—A person who presents to a county clerk for registration as a practitioner of veterinary medicine or surgery any diploma or certificate fraudulently obtained or practices veterinary medicine and surgery without complying with or contrary to law, is guilty of a misdemeanor. This section shall not be construed to prohibit students from prescribing under the supervision of preceptors, or to prohibit gratuitous services in case of emergency or the services of an authorized practitioner of a neighboring state when incidentally called into requisition.

Former section repealed, Laws 1887, chap. 647, § 9. Present section added, Laws 1893, chap. 692; takes effect Oct. 1, 1893.

See *People v. Nice*, 3 N. Y. Cr. Rep. 51; 34 Hun 296; *Wiel v. Cowles*, 45 id. 306; *People v. Fulda*, 7 N. Y. Cr. Rep. 1, 4, note; 4 id. 139.

§ 357. Acts of intoxicated physicians.—A physician or surgeon, or person practicing as such, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act, as a physician and surgeon, to another person by which the life of the latter is endangered, or his health seriously affected, is guilty of a misdemeanor.

As to liability where death ensues, see § 200, *ante*.

§ 358. Willfully poisoning food, etc.—A person who willfully mingles poison with any food, drink or medicine, intended or prepared for the use of human beings, and a person who willfully poisons any spring, well or reservoir of water, is punishable by imprisonment in a state prison not exceeding ten years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or both such fine and imprisonment.

Crimes against public health are such as endanger the physical health of the people at large, such as polluting streams. 6 Rand 726.

Or fountains. 8 N. H. 203; 37 Ala. 123.

Or rendering water unwholesome, corrupt or unfit for use. 8 N. H. 203; 6 Car. & P. 292; 4 Up. Can. Q. B. 158.

Any acts or omissions which are liable to generate disease or communicate disease is an indictable offense. 3 Hill, 479; 35 Iowa, 570; 8 N. H. 203; 15 Wend. 397.

§ 359. Overloading passenger vessel.—A person navigating a vessel for gain, who willfully or negligently receives so many passengers, or such a quantity of other lading, on board the vessel that by means thereof it sinks or is upset or injured, and thereby the life of a human being is endangered, is guilty of a misdemeanor.

As to liability where human being killed, see § 197, *ante*.

§ 360. Unauthorized pressure of steam.—A person who applies, or causes to be applied, to a steam boiler a higher pressure of steam than is allowed by law, or by the inspector, officer or person authorized to limit the pressure of steam to be applied to such boiler, is guilty of a misdemeanor.

Gross carelessness, resulting in injury to others, is criminal, even if the act done be lawful. 11 Humph. 159; 4 Mason, 505; 4 Car. & P. 398.

Acts of omission, as well as commission, may be criminal. 2 Blatchf. 528; 4 Cox C. C. 449.

So, also, as to the officer of the steamboat through whose negligence the explosion takes place. 5 McLean, 242; *People v. Jenkins*, 1 Hill, 469.

Carriers of passengers on Sunday not protected from liability for negligence. *Landers v. Staten I. R. Co.*, 13 Abb. (N. S.) 338.

§ 361. Generation of unsafe amount of steam.—A captain or other person having charge of the machinery or boiler of a steamboat, used for the conveyance of passengers, in the waters of this state, who from ignorance or gross neglect, or for the purpose of increasing the speed of the boat, creates, or causes to be created, an undue and unsafe pressure of steam, is guilty of a misdemeanor.

See *Landers v. Railroad Co.*, 13 Abb. 378; *People v. Jenkins*, 1 Hill, 467.

§ 362. Mismanagement of steam boilers.—An engineer or other person having charge of a steam boiler, steam engine, or other apparatus for generating or employing steam, employed in a railway, manufactory, or other mechanical works, who, willfully or from ignorance or gross neglect, creates or allows to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

See § 198, *ante*.

Where a man appointed to tend a steam engine of a colliery left it in charge of an incompetent person and death ensued, he is guilty of manslaughter. 4 Cox C. C. 449; 3 Car. & K. 123.

§ 363. Fictitious copartnership names. — A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation "and company," or "& Co." when no actual partner or partners are represented thereby, is guilty of a misdemeanor. But this section does not apply to any case, where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor, or other person.

§ 363a. Carrying on or conducting business as agent.—

1. Any person now carrying on or conducting a general mercantile or manufacturing business within this state, or hereafter commencing such business at or in a fixed location, as agent or manager for another or others, shall, within thirty days after the passage of this act, or the commencement of such business, file a sworn statement, verified by such agent and principal or principals, in the county clerk's office of the county within which said business is carried on, stating the nature of the business and the full name and residence of such principal or principals.

2. Any person or persons, principal or principals, may be relieved from all liability for the future act of such agent or manager by filing in the office of the county clerk where the original statement appointing such agent or manager is filed, a statement revoking such agency or managership, to take effect ten days after the filing thereof, said statement to be acknowledged before an officer authorized to take acknowledgments of deeds and to be published in at least three consecutive issues of a newspaper published in the county in which the business of said agent or manager is carried on; but if no newspaper is published in said county, then said statement shall be published in an adjoining county.

3. The county clerk shall keep a register of the names of such agents in alphabetical order, and of their principals, for which registering and filing he shall receive a fee of one dollar; and copies of such certificate and registry certified by him and the affidavit of such publication, shall be evidence.

4. Any person or persons failing to make and file the statement required by the first paragraph of this act, as therein required, shall be guilty of a misdemeanor.

Added Laws 1898, chap. 708; took effect May 16, 1893.

See *O'Toole v. Garvin*, 1 Hun, 92; *Swords v. Owens*, 43 How. 176; *Cohn v. Gottschalk*, 16 State Rep. 818; *Wood v. Erie Ry. Co.*, 72 N. Y. 196; *Barrow v. Yost*, 35 State Rep. 880; *Rosenheim v. Rosenfield*, 87 id. 551.

§ 364. **Offenses against trade-marks.**—A person who, knowingly, in a case where provision for the punishment of the offense is not otherwise specially made by statute :

1. Falsely makes or counterfeits a trade-mark ; or,
2. Affixes to any article of merchandise, a false or counterfeit trade-mark, knowing the same to be false or counterfeit, or the genuine trade-mark, or an imitation of the trade-mark of another without the latter's consent; or,
3. Sells, or keeps or offers for sale an article of merchandise, to which is affixed a false or counterfeit trade-mark, or the genuine trade-mark, or an imitation of the trade-mark of another, without the latter's consent ; or,
4. Has in his possession a counterfeit trade-mark, knowing it to be counterfeit, or a die, plate, brand, or other thing for the purpose of falsely making or counterfeiting a trade-mark ; or,
5. Makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, an article of merchandise with such a trade-mark as to appear to indicate the quantity, quality, character, place of manufacture or production, or persons manufacturing or producing the article, but not indicating it truly ; or,
6. Who knowingly sells, offers or exposes for sale, any goods which are represented in any manner, by word or deed, to be the manufacture or product of any person, firm or corporation, other than himself, unless such goods are contained in the original packages and under the labels, marks or names placed thereon, by the manufacturer who is entitled to use such marks, names, brands or trade-marks ; or,
7. Who shall sell or shall expose for sale any goods in bulk, to which no label or trade-mark shall be attached, and shall by representation, name or mark written or printed thereon, represent that such goods are the production or manufacture of a person who is not the manufacturer ;

Is guilty of a misdemeanor.

See *People v. Molins*, 7 N. Y. Cr. Rep. 51; *People v. Fisher*, 50 Hun, 552.

A trade-mark is a subject of forgery 1 Whart. Crim. Law (8th ed.). § 690; 2 Russ. Cr., § 704.

§ 365. **"Article of merchandise" defined.**—The expression "article of merchandise," as used in this title, signifies any goods, wares, work of art, commodity, compound, mixture or other preparation or thing, which may be lawfully kept or offered for sale.

§ 366. **"Trade-mark" defined.**—A "trade-mark" is a mark used to indicate the maker, owner or seller of an article of merchandise, and includes, among other things, any name of a person or corporation, or any letter, word, device, emblem, figure, seal, stamp, diagram, brand, wrapper, ticket, stopper, label or other mark, lawfully adopted by him, and usually affixed to an article of merchandise to denote that the same was imported, manufactured, produced, sold, compounded, bottled, packed or otherwise prepared by him; and also a signature or mark, used or commonly placed by a painter, sculptor or other artist, upon a painting, drawing, engraving, statue or other work of art, to indicate that the same was designed or executed by him.

See U. S. R. S. (2d ed.), §§ 4937–4947; 6 Walt's Act. and Def. 27, 28; 3 Alb. L. J. 143; Moak's Underhill Torts, 612; 4 Lawson's Rights, Remedies and Practice, § 1633.

A person cannot acquire a trade-mark in a genuine name of a particular article of merchandise, *e. g.*, "Schnapps." *Wolfe v. Burke*, 7 Lans. 151; reversed on other grounds, 56 N. Y. 115.

Words, marks, or devices, which do not denote the goods or property or particular place of business of a person, but only the nature, kind or quality of the goods in which he deals, cannot be appropriated as his exclusive trade-mark. *Stokes v. Lundgraff*, 17 Barb. 608; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. 599; *Corwin v. Daly*, 7 Bosw. 222; *Bininger v. Wattles*, 28 How. 206.

No person can acquire an exclusive right to the use of words to denote the name of the article sold by him, if in their ordinary acceptation they designate the same or a similar article. *Wolfe v. Goulard*, 18 How. 64; *Town v. Stetson*, 3 Daly, 53; 5 Abb. Pr. 218; *Caswell v. Davis*, 58 N. Y. 223; *Cook v. Starkweather*, 13 Abb. (N. S.) 392; *Corwin v. Daly*, 7 Bosw. 222.

A manufacturer cannot have the exclusive right to the manner of putting up his goods for sale. *Faber v. Faber*, 49 Barb. 357; 3 Abb. (N. S.) 115.

A person may acquire a trade-mark in the use of a common word to designate a particular style of goods manufactured by him. *Mescrolo v. Tynberg*, 36 How. 141; 4 Abb. (N. S.) 410. See *Rellett v. Carlier*, 61 Barb. 435; 11 Abb. (N. S.) 186.

What is sufficient to establish plaintiff's right to the exclusive use of an arbitrary device as a trade-mark. *Popham v. Wilcox*, 6 J. & Sp. 274.

New words, or compounds of those previously in use, may be protected as trade-marks. *Caswell v. Davis*, 4 Abb. (N. S.) 6; 35 How. 76.

The new use of a word will be protected as a trade-mark. *Meserole v. Tynberg*, 4 Abb. (N. S.) 410; 36 How. 14.

The use of the name of the place where an article is manufactured may be used as an exclusive trade-mark. *Newman v. Alvord*, 49 Barb. 588; 35 How. 108; 51 N. Y. 189.

A geographical name, as a rule, cannot be used as a trade-mark. *Lea v. Wolf*, 1 S. C. 626; 15 Abb. (N. S.) 1; 46 How. 157; *Glendon Iron Works v. Uhler*, 75 Penn. St. 467.

The number 803 used by a manufacturer of pens on his pens and boxes will be protected. *Gillott v. Esterbrook*, 48 N. Y. 374.

The words "Congress water" is a valid trade-mark. *Congress and Emp. Co. v. High Rock Cong. Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82. "Magnetic Balm." *Smith v. Sixbury*, 25 Hun, 232. "Pride Cigars." *Hier v. Abrahams*, 82 N. Y. 519.

A person cannot acquire a trade-mark in his own name, so as to enjoin another of the same name impressing it upon his goods. *Faber v. Faber*, 49 Barb. 357; 8 Abb. (N. S.) 115; *Wolfe v. Burke*, 7 Lans. 151; *Meneely v. Meneely*, 1 Hun, 367; 62 N. Y. 427; *Phelan v. Collender*, 6 Hun, 244. See 8 Alb. L. J. 100; *Meridan Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 410; *Helmbold v. Helmbold Manuf. Co.*, 58 How. Pr. 453.

The proprietor of a hotel has a trade-mark in the name of his house. *Howard v. Henriques*, 8 Sandf. 725.

Words belonging to the general public, which truly describe a known product, cannot be exclusively used as a trade-mark. *Helmbold v. Helmbold Manuf. Co.*, 58 How. 453.

The words "Gold medal" on a wrapper not valid. *Taylor v. Gillies*, 59 N. Y. 381.

Where a theater has acquired a particular name, as "Booth's Theater," the continued use of the same will not be enjoined. *Booth v. Jarrett*, 52 How. 169

§ 367. "**Affixing**" defined.—A trade-mark is deemed to be affixed to an article of merchandise when it is placed, in any manner, in or upon, either

1. The article itself; or,
2. A box, bale, barrel, bottle, case, cask or other vessel or package, or a cover, wrapper, stopper, brand, label or other thing, in, by or with which the goods are packed, inclosed or otherwise prepared for sale or disposition.

§ 368. **Trade-marks deemed "counterfeited."**—An "imitation of a trade-mark" is that which so far resembles a genuine trade-mark as to be likely to induce the belief that it is genuine, whether by the use of words or letters, similar in appearance or in sound, or by any sign, device or other means whatsoever.

One manufacturer may imitate the style of goods made by another, provided he use no device to deceive purchasers. *Merrimack Manuf'g Co. v. Garner*, 4 E. D. Smith, 387; 2 Abb. 318.

A party will be restrained from using a colorable imitation of another's trade-mark. *Clark v. Clark*, 25 Barb. 76; *Brooklyn White Lead Co. v. Masury*, id. 416; *Williams v. Johnson*, 2 Bosw. 1; *Brown v. Mercer*, 5 J. & Sp. 265; *Godillot v. Hazard*, 7 Daily Reg. 773.

The semblance must be such as to amount to a false representation, which is liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose goods are imitated. *Popham v. Cole*, 66 N. Y. 69; 6 J. & Sp. 274; 14 Abb. (N. S.) 206; *Electro Silicon Co. v. Levy*, 59 How. 469.

When ordinary attention on the part of customers will detect the difference, the courts will not interfere. *Popham v. Cole*, 66 N. Y. 69.

The simulated mark should have been so close a resemblance to the genuine as to deceive a person of ordinary caution. *Coleman v. Crump*, 70 N. Y. 573; 9 J. & Sp. 548; *Electro Silicon Co. v. Levy*, 59 How. 469.

§ 369. Refilling or selling stamped mineral water bottles, etc.—Any person engaged in making, bottling, packing, selling or disposing of milk, ale, beer, cider, mineral water or other beverage, may register his title as owner of a trade-mark by filing with the secretary of state and the clerk of the county where the principal place of business of such person is situated, a description of the marks and devices used by him in his business, and in case the same has not been heretofore published according to the laws existing at the time of publication, causing the same to be published in a newspaper of the county, three weeks daily, if in the city of New York or Brooklyn, and weekly if in any other part of the state; but no trade-mark shall be filed which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm or corporation unaccompanied by a mark sufficient to distinguish it from the same name when used by another person. After such registration the use without the consent of the owner of the trade-mark, so described, or the filling of any bottle, siphon, barrel, vessel or thing for the purpose of sale, or for the sale therein, of any article of the same general nature and quality which said bottle, siphon, barrel, vessel or other thing before contained, without the obliteration or defacement of the trade-mark upon it, when such trade-mark can be obliterated or defaced without substantial injury to the bottle, siphon, barrel, vessel or other thing so as to prevent its wrongful use, shall be deemed a misdemeanor.

See *Mullins v. People*, 24 N. Y. 399; 23 How. Pr. 289.

§ 370. Keeping such bottles with intent to refill or sell them.— Any person engaged in the business of buying and selling bottles, siphons, barrels or other vessels or things, who shall, with intent to defraud the registered owner of a trade-mark, knowingly sell or offer for sale any bottle, siphon, barrel, vessel or other thing to any person, who he has reason to believe wrongfully intends to use the trade-mark upon it, or to fill such bottle, siphon, barrel, vessel or other thing in violation of section three hundred and sixty-nine, shall be deemed guilty of a misdemeanor.

See *Mullins v. People*, 24 N. Y. 399.

§ 371. Search for bottles kept in violation of law, authorized.— Whenever a registered owner of a trade-mark, or his agent, makes oath before a magistrate that he has reason to believe and does believe, stating the grounds of his belief, that a bottle, siphon, barrel, vessel or other thing to which is affixed a trade-mark belonging to him is being used or filled, or has been sold or offered for sale, by any person whomsoever, in violation of the preceding sections, then the magistrate may issue a search warrant to discover the thing and cause the person having it in possession to be brought before him and may thereupon inquire into the circumstances, and if on examination he finds that such person has been guilty of the offense charged, he may hold the offender to bail to await the action of the grand jury, and the offender shall also be liable to an action on the case for damages for such wrongful use of such trade-mark at the suit of the owner thereof, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use.

See Laws 1887, chap. 377; Laws 1888, chap. 181; *People v. Hogan*, 29 State Rep. 110; *Mullins v. People*, 24 N. Y. 399; 23 How. 289.

§ 372. Defacing marks upon wrecked property.— A person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof, with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading or other document tending to show the ownership thereof, is guilty of a misdemeanor.

Goods contained in a vessel sunk or abandoned at sea, and which are not cast upon the shore, are not "wrecks" within the statute. *Baker v. Hoag*, 7 N. Y. 555. The sea includes navigable rivers to extent of tide-water. *Id.*

§ 373. Floating logs or defacing marks thereon.—A person who:

1. Floats, runs or assists in floating or running any lumber, logs or other timber upon or over any river not excepted by law, within this state, recognized by law or use as a public highway for the purpose of floating and running lumber, logs and other timber therein, without first filing the bond executed and approved as required by law; or

2. Unlawfully cuts out, alters or defaces any mark made upon any log or lumber, whether such mark be recorded or not, or puts a false mark upon any log or lumber floating in any of the waters of this state or lying upon land; is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1893; Laws 1893, ch. 692.

§ 374. Officer unlawfully detaining wrecked property.

—An officer, whose duties pertain in any way to wrecked property, who, without authority of law, detains such property or the proceeds thereof, after the salvage and expenses chargeable thereon have been paid or offered to him, or who is guilty of any fraud, embezzlement or extortion in the discharge of such duties, is guilty of a misdemeanor.

§ 375. Fraud in affairs of limited partnership.—A member of a limited partnership, who is guilty of any fraud in the affairs of the partnership, is guilty of a misdemeanor.

§ 376. Solemnizing unlawful marriages.—A minister or magistrate who solemnizes a marriage when either of the parties is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which within his knowledge a legal impediment exists, is guilty of a misdemeanor. Until a marriage has been dissolved or annulled by a proper tribunal or court of competent jurisdiction, any person who shall assume to grant a divorce, in writing, purporting to divorce husband and wife and permitting them or either of them to lawfully marry again, shall be guilty of a misdemeanor punishable by fine for the first offense not exceeding five hundred dollars, and for the second offense one thousand dollars, or imprisonment not exceeding one year, or both such fine and imprisonment.

In effect, as amended, April 22, 1893; Laws 1893, ch. 461.

It is no defense to an indictment for bigamy that the marriage ceremony was performed by a pretended minister. *Hayes v. People*, 25 N. Y. 390.

As to who may solemnize marriages for the purpose of registering and authenticating the same, see Laws 1889, chap. 415.

The age of legal consent for contracting marriage shall be eighteen years in case of males, and sixteen in case of females. Laws 1877, chap. 24.

§ 377. Unlawful confinement of idiots, insane persons, etc.—A person who confines an idiot, lunatic or insane person,

in any other manner or in any other place than as authorized by law, and a person guilty of harsh, cruel or unkind treatment of, or any neglect of duty towards, any idiot, lunatic or insane person under confinement, whether lawfully or unlawfully confined, is guilty of a misdemeanor.

See § 223, subd. 6, *ante*.

§ 378. **Taking usury.**—A person who directly or indirectly receives any interest, discount, or consideration upon the loan or forbearance of money, goods or things in action, greater than is allowed by statute, is guilty of a misdemeanor.

§ 379. **Reconfining persons discharged upon writ.**—A person, who either solely, or as a member of a court, or in the execution of a judgment, order or process, knowingly recommits, imprisons or restrains of his liberty, for the same cause, any person who has been discharged from imprisonment upon a writ of *habeas corpus*, or *certiorari*, is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or both; and in addition to the punishment prescribed therefor, he forfeits to the party aggrieved one thousand two hundred and fifty dollars, to be recovered in a civil action.

See *Yates' Case*, 4 Johns. 818; 6 *Id.* 337; *Matter of Felton*, 16 How. 303.

As to when discharged prisoners may and may not be re-imprisoned, see Code Civ. Proc., § 2050.

After a prisoner's discharge on *habeas corpus*, a sheriff has no authority to re-arrest and imprison him upon the same sentence upon which he was imprisoned the first time, and such re-arrest is unlawful. *Matter of Crow*, 30 Alb. L. J. 210; 60 Wis. 349. See, also, *Matter of Jits*, 64 Mo. 205; 27 Am. Rep. 218.

§ 380. **Concealing persons entitled to writ of deliverance.**—A person having in his custody or power, or under his restraint, one who would be entitled to a writ of *habeas corpus* or *certiorari*, or for whose relief a writ of *habeas corpus* or *certiorari* has been issued, who, with intent to elude the service of such writ, or to avoid the effect thereof, transfers the party to the custody, or places him under the power or control of another, or conceals or changes the place of his confinement, or who, without lawful excuse, refuses to produce him, is guilty of a misdemeanor, punishable as prescribed in the last section.

Where a party takes a child and conceals him from the custody of its father, he is liable to be prosecuted for a misdemeanor. *Rising v. Dodge*, 2 Duer, 42.

§ 381. Innkeepers and carriers refusing to receive guests and passengers.—A person who, either on his own account or as agent or officer of a corporation, carries on business as innkeeper, or as common carrier of passengers, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

§ 382. Frauds on hotel-keepers.—A person who obtains any food or accommodation at an inn or boarding-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn or boarding-house by the use of any false pretense, or who, after obtaining credit or accommodation at an inn or boarding-house, absconds and surreptitiously removes his baggage therefrom without paying for his food and accommodation, is guilty of a misdemeanor.

See 23 Abb. N. C. 256, 257.

An indictment for defrauding a hotel-keeper under the act of 20th April, 1876, must set forth the nature and character of the acts and circumstances, indicative of the fraudulent intent of the defendant, otherwise the court will on motion, quash the indictment. *Com. v. A. B. Dennis*, 1 Lehigh Valley Law Rep. (Penn.) 14.

§ 383. Protecting civil public rights.—A person who:

1. Excludes a citizen of this state, by reason of race, color or previous condition of servitude, from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theatres or other places of amusement, or by teachers and officers of the common schools and public instructions* of learning, or by cemetery associations; or

2. Denies or aids or incites another to deny to any other person because of race, creed or color, full enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyance on land or water, theatre or other place of public resort or amusement, is guilty of a misdemeanor, punishable by fine of not less than fifty dollars nor more than five hundred dollars.

In effect, as amended Oct. 1, 1893; Laws 1893. ch. 692.

This section does not infringe the constitutional provision securing the right to life, liberty and property, but is a valid exercise of the police power of the state. *People v. King*, 110 N. Y. 420; 11 Crim. Law Mag. 106; affirming 42 Hun, 186.

Indictment sufficient which alleges exclusion in words of statute, though does not allege manner of exclusion. *People v. King*, 110 N. Y. 420.

Evidence of refusal to sell such persons tickets, such as are sold to all others who applied, supports the allegation that they were excluded. *People v. King*, 110 N. Y. 420; 11 Crim. Law Mag. 106.

§ 384. **Acrobatic exhibitions.**—The proprietor, occupant or lessee of any place where acrobatic exhibitions are held, who permits any person to perform on any trapeze, rope, pole or other acrobatic contrivance, without net work, or other sufficient means of protection from falling or other accident, and any person who makes or attempts to make an ascension by means of a balloon, with a trapeze or parachute attachment, or any other device for the purpose of making a descent from such balloon, is guilty of a misdemeanor, punishable, for the first offense by a fine of two hundred and fifty dollars, and for each subsequent offense, by a fine of two hundred and fifty dollars, and imprisonment not less than three months nor more than one year.

In effect, as amended, July 1, 1892; Laws 1892, ch. 268.

§ 384a. **Contracts in relation to Indian lands.**—A person who without the authority and consent of the legislature, in any manner or for or on any terms, purchases any lands within this state of any Indian residing therein, or makes any contract with any Indian for or concerning the sale of any lands within this state, or gives, sells, demises, conveys or otherwise disposes of any such lands, or any interest therein, or offers so to do, or enters upon or takes possession of or settles upon any such lands, by pretext or color of any right or interest in the same, in consequence of any such purchase, or contract made or to be made, since October fourteen, seventeen hundred and seventy-five, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 384b. **Penalty for dealing in convict made goods of other states without labeling.**—A person having in his possession for the purpose of sale, or offering for sale, any convict made goods, wares or merchandise, manufactured in any other state, without the brand, mark or label required by law or who removes or defaces such brand, mark or label, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

TITLE XII.

OF CRIMES AGAINST THE PUBLIC HEALTH AND SAFETY.

- SECTION 385.** "Public nuisance" defined.
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391. Violation of quarantine laws, by master of vessel.
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- 405a. Regulations as to prescriptions of opium and morphine.
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- SECTION 421. Failure to ring bell, etc.
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423. Platforms and heating apparatus of passenger car.
424. Guard posts; automatic couplers.
425. Officers of railroad companies to be uniformed.
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427. Dangerous exhibitions; bathing.
428. Fires and lights on vessels in New York, Kings and Queens counties.
429. Duty of guarding ice cuttings; how long such guards must be maintained; violation of duty to maintain guards around ice cuttings.
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430. Articles in imitation of food.
431. Noisome or unwholesome substances, etc., in highway.
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442. Use of certain dredges.
443. Mock auctions.
444. Interfering with navigation.
445. Maintaining private insane asylums.
446. Entry into agricultural fair grounds.
447. Drugging person, etc.
447a. Negligently furnishing insecure scaffolding.

§ 385. "Public nuisance" defined.—A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission :

1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or
2. Offends public decency; or

3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, a lake, or a navigable river, bay, stream, canal or basin, or a public park, square, street or highway; or,

4. In any way renders a considerable number of persons insecure in life, or the use of property.

See Code of Civ. Proc., §§ 1660, 1662; *People v. Klock*, 48 Hun, 277; *Moak's Underhill Torts*, 229 *et seq.*; 1 Bish. Crim. Law (7th ed.), § 1071; *Wood Nuisances*, chap. 2; 4 Wait's Act. and Def. 729 *et seq.*; 35 Eng. Rep. 367.

Gambling apparatus is a nuisance. § 338, *ante*.

"A public or common nuisance is such an inconvenient or troublesome offense as annoys the whole community in general and not merely some particular person." 4 Bl. Com. 167.

Whatever is injurious to a large class of the community, or annoys that portion of the public that necessarily comes in contact with it, is a public nuisance at common law. *Lansing v. Smith*, 8 Cow. 146; *Prout's Case*, 4 City Hall Rec. 87.

The principles governing the liabilities for public and private nuisances are fully discussed in *Heeg v. Licht*, 80 N. Y. 579; 8 Abb. N. C. 355.

No length of time will legalize a nuisance. *People v. Cunningham*, 1 Den. 524; *Rochester v. Erickson*, 46 Barb. 92; *Ogdensburgh v. Lovejoy*, 2 Th. & C. 83; 58 N. Y. 662; *Campbell v. Seaman*, 63 id. 568; *Dyggert v. Schenck*, 23 Wend. 446; *DeLancy v. Blizzard*, 7 Hun, 8; *Patten v. Railroad Co.*, 3 Abb. N. C. 324.

But this rule does not apply to the case of a simple encroachment on a highway not amounting to an obstruction, or a real and substantial annoyance to the public. *Peckham v. Henderson*, 27 Barb. 207.

That which is authorized by competent legal authority cannot in law constitute a nuisance. *Davis v. Mayor, etc.*, 14 N. Y. 506; *People v. Gas Co.*, 6 Lans. 467; 64 Barb. 55; *Phoenix v. Commrs.*, 12 How. Pr. 1; *Harris v. Thompson*, 9 Barb. 350; *Plant v. Long Island R. Co.*, 10 id. 26; *Crooke v. Railroad Co.*, 8 Week. Dig. 252; *Caro v. Railroad Co.*, 46 N. Y. Super. 138; 19 Am. Law Reg. (N. S.) 376; *People v. Long Island R. Co.*, 9 Abb. N. C. 181; *People v. Telephone Co.*, 11 id. 304; *People v. Kelly*, 76 N. Y. 475.

The following have been held nuisances, *per se* :

Any structure adjoining a pier if it obstructs the free use and navigation of the harbor. *Moore v. Board, etc.*, 32 How. Pr. 184.

A floating ship in a slip at the wharves of New York city. *Hecker v. Balance Dock Co.*, 13 How. Pr. 549. But see 24 Barb. 215.

A crib or pier erected in navigable waters for private use. *People v. Vanderbilt*, 26 N. Y. 287; *DeLancy v. Blizzard*, 7 Hun, 7.

The navigation of a steamboat by the use of an uninspected boiler is a public nuisance. *Van Orden v. Robinson*, 45 Hun, 567.

A canal-boat permanently stationed in a basin. *Hart v. Mayor*, 9 Wend. 571; affirming 3 Paige, 213.

An unsafe bridge. *People v. Mohawk Bridge Co.*, 7 Alb. L. J. 233.

A defective road. *Susquehanna Trans. Co. v. People*, 15 Wend. 267; *Waterford Turnpike Co. v. People*, 9 Barb. 161; *People v. Cunningham*, 1 Den. 524;

A fruit stand, a permanent structure materially encroaching on a sidewalk of a public street in a thickly-inhabited part of a city, is an indictable nuisance, whether it essentially interferes with the comfortable enjoyment of the sidewalk or not. *State v. Berdetta*, 73 Ind. 185; 38 Am. Rep. 117.

Defendant, a wholesale grocer, was accustomed to place skids, planked over, from the stoop of his store across the sidewalk to a wooden horse. Over this bridge goods were conveyed from the store to trucks in the street, obstructing the sidewalk from four to five hours of each business day. Held, that he was guilty of a public nuisance. *Callanan v. Gilman*, 107 N. Y. 360; 1 Am. St. Rep. 83, note. Earl, J., said: "The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street, or encroachment thereon, which interferes with such use, is a public nuisance. But there are exceptions to the general rule, born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways, without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. But it is not sufficient that the obstructions are necessary with reference to the business of him who creates and maintains them; but they must also be reasonable with reference to the rights of the public, who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact, to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

"*Rex v. Russell*, 6 East, 427, where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said, that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and any thing which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot.'

"In *Rex v. Cross*, 3 Campb. 224, the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: 'Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable-yard. * * * A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another.'

"In *Rex v. Jones*, 3 Campb. 230, the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and

sawing of logs, and the court said: 'If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gate-way, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doat the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber yard; and if the street be too narrow, he must move to a more convenient place for carrying on his business.'

"In *Con. v. Passmore*, 1 Serg. & R. 217, the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city, and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: 'It is true, necessity justifies actions which would otherwise be nuisances. It is true also that the necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried into his house, and it may be there a reasonable time. So because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. * * * I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street, because it saves the expense of storage; but there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business.'

"In *People v. Cunningham*, 1 Denio, 524, the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said: 'The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in *Russell's Case*, above cited: 'They must either enlarge their premises, or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest in the community.'

"In *Waleh v. Wilson*, 101 N. Y. 254; 54 Am. Rep. 698, a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: 'The defendant had the right to place the skids across the sidewalk temporarily for purposes of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right, to be exercised in a reasonable manner so as not to unnecessarily incumber and obstruct the sidewalk.'

"In *Mathews v. Kelsey*, 58 Me. 56, the court said: 'As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street), as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others.'"

The construction by a railroad of a bridge of less width than the highway is not *per se* a nuisance. *People v. New York Cent., etc., R. Co.*, 89 N. Y. 266.

The question is whether, under all the circumstances, the company unnecessarily impaired the usefulness of the highway by the manner of constructing the bridge. *People v. New York Cent., etc., R. Co.*, 89 N. Y. 266.

Where the legislature has granted the privilege to erect a dam to a certain height, the maintaining of a dam at a greater height is not, as matter of law, a public nuisance, and if it were, it does not follow that any one except the people, or some riparian owner who is specially injured thereby, can complain of it. *Grout v. Monk*, 26 Hun, 380; affirmed, 94 N. Y. 115.

Where, on the trial of an indictment for a nuisance, the defendant is found guilty of erecting and maintaining a dam which was the nuisance alleged, and the indictment contains no averment as to the continuance of the nuisance, the court cannot render a judgment abating the nuisance, but can only inflict a personal punishment upon the defendant. *Munson v. People*, 5 Park. 16.

In an action by the attorney-general to abate a public nuisance, he can only raise a question as to a public wrong, and cannot raise a question over a contract between individuals. *People v. Brooklyn, etc., R. Co.*, 15 Week. Dig. 74; affirming 12 id. 375.

Upon the trial of an indictment under this section for obstructing a highway, where it appears that lands have been dedicated by the owner to the public as a highway, the acceptance by the public which establishes the highway in question and the obstruction to it, upon which the indictment is based, may be found by one and the same jury. *People v. Lochfelm*, 103 N. Y. 1; 4 N. Y. Cr. Rep. 159.

A party acting under the authority of the commissioner of highways, and thereby obstructing the public highway, does not act unlawfully, and therefore his action does not come within this section. *People v. Crounse*, 7 N. Y. Cr. Rep. 11; 57 Hun, 489.

Where defendant is accused of having willfully and maliciously obstructed the public highway, by causing water to flow thereon, by constructing a dam on private land, evidence that such obstruction was made under the direction and authorization of the commissioner of highways, is admissible in defense. *People v. Crounse*, 7 N. Y. Cr. Rep. 11; 51 Hun, 489.

A husband while acting as the agent of his wife in regard to her lands, cannot be made liable and punished for continuing a nuisance thereon. *People v. Crounse*, 51 Hun, 489; 7 N. Y. Cr. Rep. 11; *People v. Livingston*, 27 Hun, 105.

§ 386. **Unequal damage.** — An act which affects a considerable number of persons, in either of the ways specified in the last section, is not less a nuisance because the extent of the damage is unequal.

§ 387. **Maintaining a nuisance a misdemeanor.** — A person, who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who willfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor.

See *Syracuse, etc., R. Co. v. Tully*, 66 Barb. 25; *Wasner v. Railroad Co.*, 80 N. Y. 212.

§ 388. **Permitting building to be used for nuisance, etc.** — A person who,

1. Lets, or permits to be used, a building, or portion of a building, knowing that it is intended to be used for committing or maintaining a public nuisance, or

2. Opens or maintains a place where opium, or any of its preparations, is smoked by other persons, or

3. At such place sells or gives away any opium, or its said preparations, to be there smoked or otherwise used, or

4. Visits or resorts to any such place for the purpose of smoking opium or its said preparations;

Is guilty of a misdemeanor.

A law forbidding the sale of opium is constitutional. *State v. Ah Crew*, 16 Nev. 50; 40 Am. Rep. 488.

§ 389. **Keeping gunpowder unlawfully.** — A person who makes or keeps gunpowder, nitro-glycerine, or any other explosive or combustible material, within a city or village, or carries such materials through the streets thereof, in a quantity or manner prohibited by law or by ordinance of the city or village, is guilty of a misdemeanor. And a person who, by the careless, negligent, or unauthorized use or management of gunpowder or other explosive substance, injures or occasions the injury of the person or

property of another, is punishable by imprisonment for not more than two years. Any person or persons who shall knowingly present, attempt to present, or cause to be presented or offered for shipment to any railroad, steamboat, steamship, express or other company engaged as common carrier of passengers or freight, dynamite, nitro-glycerine, powder or other explosives dangerous to life or limb, without revealing the true nature of said explosives or substance so offered or attempted to be offered to the company or carrier to which it shall be presented, shall be guilty of a felony, and upon conviction, shall be fined in any sum not exceeding one thousand dollars and not less than three hundred dollars, or imprisonment in a state prison for not less than one nor more than five years, or be subject to both such fine and imprisonment.

See Wood's Nuisances, § 78; *Van Orden v. Robinson*, 45 Hun, 570.

The careless or negligent keeping of gunpowder near dwelling-houses, so as to endanger life, is a public nuisance. *Bradley v. People*, 56 Barb. 72; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; 8 Abb. N. C. 355; *Rhodes v. Dunbar*, 57 Penn. St. 274.

§ 390. Throwing gas-tar, etc., into public waters.—A person who throws or deposits gas-tar, or the refuse of a gas house or gas factory, or offal, refuse, or any other noxious, offensive, or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters, is guilty of a misdemeanor.

§ 391. Violation of quarantine laws, by master of vessel.—A master of a vessel subject to quarantine or visitation by the health officer, arriving in the port of New York, who refuses or omits,

1. To proceed to and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or,

2. To submit his vessel, cargo and passengers, to the examination of the health officer, and to furnish all necessary information to enable that officer to determine the length of quarantine and other regulations to which they ought respectively to be subject; or,

3. To remain with his vessel at quarantine during the period assigned for her quarantine, and while at quarantine to comply with the directions and regulations prescribed by law, and with

such as any of the officers of health, by virtue of the authority given to them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers or crew, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

§ 392. Giving false information relative to vessel, or permitting person to land before visit of health officers.—A master of a vessel, hailed by a pilot, who

1. Gives false information to such pilot, relative to the condition of his vessel, crew or passengers, or the health of the place or places from whence he came, or refuses to give such information as shall be lawfully required ; or,

2. Lands any person from his vessel, or permits any person, except a pilot, to come on board of his vessel, or unlades or transships any portion of his cargo, before his vessel has been visited and examined by the health officers ; or,

3. Approaches with his vessel nearer the city of New York than the place of quarantine to which he may be directed, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or by both.

§ 393. Landing from vessel before visit of health officers. A person, who, being on board any vessel at the time of her arrival at the port of New York, lands from such vessel, or unlades, or transships, or assists in unlading or transshipping any portion of her cargo, before such vessel has been visited and examined by the health officers, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

§ 394. Going on board vessel at quarantine grounds, or entering quarantine grounds without leave.—A person who goes on board of, or has any communication or intercourse with any vessel at quarantine, or with any of the crew or passengers of such vessel, without the permission of the health officer, and every person who, without such authority, enters the quarantine grounds or anchorage, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both ; and in addition thereto he may be detained at

quarantine so long as the health officer directs, not exceeding twenty days. And in case such person shall be taken sick of any infectious, contagious or pestilential disease, during such twenty days, he may be detained at the marine hospital, for such further time as the health officer directs.

§ 395. **Violating quarantine regulations.** — A person who, having been lawfully ordered by a health officer to be detained in quarantine, and not having been discharged, leaves the quarantine grounds or anchorage, or willfully violates any quarantine law or regulation, is guilty of a misdemeanor.

§ 396. **Obstructing health officer in performance of his duty.** — A person who willfully opposes or obstructs a health officer or physician charged with the enforcement of the health laws, in performing any legal duty, is guilty of a misdemeanor.

§ 397. **Willful violation of health laws.** — A person who willfully violates any provision of the health laws, the punishment for violating which is not otherwise prescribed by those laws or by this Code; and a person who willfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any board of health or health officer, or any regulation lawfully made or established by any public officer under authority of the health laws, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or by both.

§ 398. **Unlicensed piloting.** — A person, other than a lawfully authorized branch Hell Gate pilot, who pilots, or offers to pilot, or tows or offers to tow, any boat or vessel (except barges, vessels under fifty-five tons burthen, and canal boats actually used in navigating the canals) through that part of the East river commonly called Hell Gate, is guilty of a misdemeanor. But no pilotage shall be charged to any vessel under a coasting license on entering or departing from the port of New York, by way of the East river, called Hell Gate, unless such vessel actually employs a pilot; and the making such such* charge or demand without such employment, shall be deemed a misdemeanor.

*So in the original.

If any other person than a branch Hell Gate pilot shall pilot or tow for any other person any vessel, etc., through the channel commonly called Hell Gate, he shall be deemed guilty of a misdemeanor. *People v. Sperry*, 50 Barb. 170; *Comm'rs of Pilots Pacific Mail S. S. Co.*, 52 N. Y. 609.

The act concerning the pilots of the channel of the East river, commonly called Hell Gate, held constitutional and valid. *Stillwell v. Raynor*, 1 Daly, 47.

The Federal constitution does not deprive the several states of power to legislate upon the subject of pilots. *Stillwell v. Raynor*, 12 How. (U. S.) 299.

Notwithstanding the United States pilotage act, sea-going vessels in New York harbor are subject to pilotage under state law. *Henderson v. Spofford*, 10 Abb. (N. S.) 140; 3 Daly, 861.

The pilot of a steam tug or tow boat who, being upon his own boat, tows a vessel through Hell Gate, and, by signals made to the helmsman of the vessel in tow, directs changes at the helm to conform to the steamer's movements, does not pilot such vessel within the prohibition relative to Hell Gate pilots. *People v. Francisco*, 10 Abb. 30; *Francisco v. People*, 4 Park. 139; 18 How. 475.

§ 399. Coasting steamers excepted. — The last section does not apply to vessels propelled wholly or partly by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting trade.

See *Griswold v. Master and Wardens of New York*, 9 Johns. 76; *Nickerson v. Mason*, 13 Wend. 64; *Sturgis v. Spofford*, 52 Barb. 436; 45 N. Y. 446.

§ 400. Acting as port warden without authority. — A person who not being a port warden, assumes or undertakes to act as such, or undertakes the performance of any of the duties prescribed by law, as pertaining to the office of port warden; and a person who knowingly employs any other than the wardens for the performance of such duties; and a person who issues any certificate of a survey on vessels, materials or goods damaged, with intent to avoid the provisions of any statute, is guilty of a misdemeanor.

See *Tinkham v. Tapscott*, 17 N. Y. 141; *Wardens v. Cartwright*, 4 Sandf. 236.

§ 401. Apothecary omitting to label drugs, or labeling them wrongly. — An apothecary, or druggist, or a person employed as clerk or salesman by an apothecary or druggist, or otherwise carrying on business as a dealer in drugs or medicines, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently or ignorantly omits to label the same, or puts any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug or medicine, or

substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor.

§ 402. Apothecary selling poison without recording the sale.— An apothecary or druggist, or a person employed as clerk or salesman by an apothecary or druggist, or otherwise carrying on business as a dealer in drugs or medicines, who sells or gives any poison or poisonous substance, without first recording in a book to be kept for that purpose, the name and residence of the person receiving such poison, together with the kind and quantity of such poison received and the name and residence of some person known to such dealer, as a witness to the transaction, except upon the written order or prescription of some practicing physician whose name is attached to the order, is guilty of a misdemeanor.

§ 403. Refusing to exhibit record.— A person whose duty it is by the last section to keep a book for recording the sale or gift of poisons, who willfully refuses to permit any person to inspect said book upon reasonable demand made during ordinary business hours, is punishable by a fine not exceeding fifty dollars.

§ 404. Selling poison without label.— A person who sells, gives away or disposes of any poison or poisonous substance (except upon the order or prescription of a regularly authorized practicing physician), without attaching to the vial, box or parcel containing such poisonous substance, a label with the name and residence of such person, the word "poison" and the name of such poison, all written or printed thereon in plain and legible characters, and a person who, after the first day of January, eighteen hundred and eighty-seven, sells, gives away or disposes of or offers for sale any sulphate or other preparation of opium or morphine, except paregoric and those preparations containing two grains or less of opium or morphine to the ounce, without attaching to the bottle, vial, box or package containing such sulphate or other preparation of opium or morphine, a scarlet label lettered in

white letters, plainly naming the contents thereof, with the name and residence of such person is guilty of a misdemeanor.

§ 405. Medical prescriptions.—No person employed in a drug store or apothecary's shop shall prepare a medical prescription, unless he has served two years' apprenticeship in such a store or shop, or is a graduate of a medical college or college of pharmacy, except under the direct supervision of some person possessing one of those qualifications; nor shall any proprietor or other person in charge of such store or shop permit any person not possessing such qualifications to prepare a medical prescription in his store or shop, except under such supervision. A person violating any provision of this section is guilty of a misdemeanor punishable by a fine not exceeding one hundred dollars, or by imprisonment not exceeding six months; and in case of death ensuing from such violation, the person offending is guilty of a felony punishable by a fine not less than one thousand dollars nor more than five thousand dollars, or by imprisonment not less than two years nor more than four years, or by both such fine and imprisonment.

This section merely relates to persons employed in a drug store or apothecary shop and not to the proprietors. *People v. Rontey*, 21 State Rep. 175.

§ 405a. Regulations as to prescriptions of opium and morphine.—A person who, except on the written or verbal order of a physician, refills more than once prescriptions containing opium, morphine or preparations of either, in which the dose of opium exceeds one-fourth grain or morphine one-twentieth grain, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 406. Concealing foreign matter in merchandise.—A person who, with intent to defraud, while putting up in a barrel, bag, bale, box, or other package, cotton, hops, hay, or any other article of merchandise whatever, usually sold by weight in such packages, places or conceals therein any other substance or thing whatever, in case where special provision for the punishment thereof is not otherwise made by statute, is guilty of a misdemeanor.

§ 407. Adulterating food, drugs, liquor, etc.—A person who, either,

1. With intent that the same may be sold as unadulterated or undiluted, adulterates or dilutes wine, milk, distilled spirits, or malt liquor, or any drug, medicine, food, or drink, for man or beast; or,
2. Knowing that the same has been adulterated or diluted; offers for sale or sells the same, as unadulterated or undiluted, or with-

out disclosing or informing the purchaser that the same has been adulterated or diluted, in a case where special provision has not been made by statute for the punishment of the offense; or,

3. Sells, or offers to sell, or stores, or transports with intent to sell for any purpose other than cooling beer in casks, ice cut from any canal, or from the wide waters or basins of any canal, unless the ice so sold, or offered for sale, or stored or transported, is contained in a building, cart, car, sleigh, float or receptacle upon which is plainly marked in Roman or capital letters, not less than eight inches square, the words "Canal Ice;" or

4. Who shall adulterate maple sugar, maple syrup or honey, with glucose, cane sugar or syrup, beet sugar or syrup, or any other substance for the purpose of sale, or who shall knowingly sell or offer for sale maple sugar, maple syrup or honey that has been adulterated in any way, shall be deemed guilty of a misdemeanor. [*Subdiv. 4, added 1892; in effect Sept. 1, 1892.*]

See Abb. Annual Dig. (1885) p. 88; 1 Russ. Crimes, 169; 1 Bish. Crim. Law (6th ed.), §§ 491, 558; 2 Bish. Crim. Proc. (3d ed.), § 863; Bish. Stat. Crimes, § 550; 2 Whart. Crim. Law (8th ed.), §§ 1118, 1433-6; 28 Eng. Rep. 384; 29 id. 148; 12 Cent. L. J. 343.

The legislature has undoubted power to prohibit the adulteration of food; *People v. Gillson*, 109 N. Y. 403; or the sale of milk below a certain standard; *People v. Cipperly*, 4 N. Y. Cr. Rep. 69; reversing 37 Hun. 324; *People v. West*, 106 N. Y. 293; *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344; *Com. v. Evans*, 132 Mass. 11; *State v. Addington*, 77 Mo. 110; or the sale of opium, *State v. Ah Crew*, 16 Nev. 50; 40 Am. Rep. 488.

Substitute for hops or pure extracts of hops in the manufacture of ale or beer deemed an adulteration. Laws 1886, chap. 467.

Laws 1881, chap. 407 (food and drugs). Food to be adulterated within the meaning of this act must contain poison, and this fact must be proved to sustain the charge. *People v. Bischoff*, 14 State Rep. 581.

Section 7, requiring labels, does not apply to the ordinary articles of food provided they are not injurious to health. *People v. Bischoff*, 14 State Rep. 581.

To warrant conviction there must be proof that the article was sold as food or as a drug, according to the allegations of the complaint, and also that the article was sold with a criminal intent or under circumstances which show criminal negligence. *People v. Fulle*, 1 N. Y. Cr. Rep. 172; 12 Abb. N. C. 196. But see *People v. Schaffer*, 41 Hun. 23.

The term "food" as used in this act includes every article used for food or drink by man, including all candies, teas, coffees and spirituous, fermented and malt liquors. The term "drug," as used in this act, includes all medicines for internal and external use. Laws 1886, chap. 477.

The act of 1881, chap. 407, was amended. Laws 1885, chap. 176.

Laws 1882, chap. 246 (adulterated butter). To justify a conviction under section 1 of this act, it is not necessary to prove that the seller intended to deceive, or that he knew that the article sold was not butter. The seller subjects himself to the penalty imposed by the statute by making the representation, not knowing it to be true. *People v. Mahaney*, 41 Hun. 26.

The presumption created by the second section is not met by showing absence of knowledge and intent to deceive, but only by controverting the testimony, on the part of the prosecution, tending to show the sale or false representation. *People v. Mahaney*, 41 Hun, 26.

Laws 1884, chap. 202 (adulterated milk). See *People v. Marx*, 99 N. Y. 377; *People v. Cipperly*, 37 Hun, 324; 101 N. Y. 634; 4 N. Y. Cr. Rep. 69; *People v. McGann*, 34 Hun, 358; *Schrumpf v. People*, 14 id. 10.

An act prohibiting the sale of adulterated milk does not embrace the offense of bringing such milk into the city. *Polinsky v. State*, 78 N. Y. 65.

Laws 1885, chap. 183 (dairy products). In *People v. Storm*, 8 State Rep. 907, the analysis of milk sold by defendant was as follows: Water, 88.74 per cent; Fat, 2.72 per cent; Solids, not fat, 8.54 per cent; Total Solids, 11.26 per cent; Ash, .68 per cent; *held*, sufficient to sustain a conviction.

To constitute an offense under this act neither knowledge nor intent need be shown. *People v. Kibler*, 106 N. Y. 321; *People v. West*, *id.* 293; 60 Am. Rep. 452; *People v. Schaffer*, 41 Hun, 23.

See, also, 30 Am. Rep. 617, note, where the cases are collated.

But see *People v. Fulle*, 12 Abb. N. C. 196; 1 N. Y. Cr. Rep. 772.

All that is required to establish the offense is to show a sale of milk falling below the standard fixed by the act, and coming within its definition of adulterated milk. *People v. Kibler*, 106 N. Y. 321.

Section 3 of this act is a valid exercise of legislative power. *People v. West*, 106 N. Y. 293.

Upon the trial of an indictment charging the defendant with having violated section 7 of this act, the court charged the jury in substance, that the simple question for the jury to determine was, as to whether the defendant had manufactured or sold an article known as oleomargarine which was not made of unadulterated milk or cream, and if he did so, he was guilty. *Held*, error. *People v. Arensberg*, 103 N. Y. 388.

In *People v. Arensberg*, 103 N. Y. 388, the court say: "Section 7 forbids two things: the manufacture not from milk or cream of an article or product in imitation or semblance of butter, or designed to take the place of butter. The latter clause is ineffectual, as we held in the *Marx Case*, 99 N. Y. 377. It was under the first, alone, that the defendant could be convicted, and yet the charge of the court ignored this element of the offense entirely, and missed the precise point of the accusation. Whether the oleomargarine manufactured by the defendant was or was not an imitation or semblance of butter became the material inquiry, but was withheld from the jury and they were instructed to convict upon proof of the manufacture and sale of the article known as oleomargarine. Practically that was a ruling as matter of law that the article thus known is an imitation of butter, whereas it may or may not be, and the question whether in a given case it is or is not is one for the jury. A sample of the product manufactured by the defendant was produced before them and open to their observation. The vital point of the alleged crime is, the manufacture and sale of an article which is an imitation and semblance of butter, and so is calculated to deceive, and indicates a deceptive purpose immediate or ultimate, and that is a question of fact which the court was not authorized to determine as a matter of law, but, upon the evidence produced, should have submitted it to the jury."

A statute prohibiting the sale of imitation butter, unless colored pink, has for its object the prevention of fraud on the public in the sale of provisions and is, therefore, within the purview of the police power of the state. *State v. Marshall*, 64 N. H. 549; 1 L. R. A. 51, note.

See, also, *Powell v. Com.*, 127 U. S. 678; 114 Penn. St. 265; *Butler v. Chambers*, 86 Minn. 69.

§ 408. Disposing of tainted food.—A person who with intent that the same may be used as food, drink, or medicine, sells, or offers or exposes for sale, any article whatever which, to his knowledge, is tainted or spoiled, or for any cause unfit to be used as such food, drink, or medicine, is guilty of a misdemeanor.

An indictment for selling unwholesome provisions sufficiently avers a sale for consumption as food for man by stating that the prisoner sold to divers citizens beef as wholesome food, well knowing the same to be diseased, unwholesome and not fit to be eaten. *Goodrich v. People*, 19 N. Y. 574.

On trial of an indictment for selling unwholesome beef, the judge refused to charge that if the jury found the meat was sold merely as an article of merchandise and not for consumption as food, defendant was not guilty. *Held*, no error. *People v. Parker*, 88 N. Y. 85.

The offense is made out by proof of the sale of flesh of an animal which the seller knew to have the disease, the nature and tendency of which are to taint and affect the flesh of the animal in any degree, although the taint was imperceptible to the senses and the eating of the flesh produced no apparent injury. *Goodrich v. People*, 19 N. Y. 574.

Guilty knowledge that the disease, *e. g.*, a running abscess in the head of a cow which had been apparent and increasing for some months, would render her flesh unwholesome, may be inferred from circumstances without proving the defendant a person of skill. *Id.*

§ 408a. Violations of agricultural law.—Any person who disregards, disobeys or violates any proclamation, notice, order or regulation, lawfully issued or prescribed by the commissioner of agriculture for the suppression or prevention of the spread of infectious or contagious diseases among domestic animals, or who violates any of the provisions of sections eighty and eighty-two of article five of the agricultural law is guilty of a misdemeanor; every person who violates any of the provisions of article two of said chapter is guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment of not less than one month nor more than six months, or by both such fines and imprisonment, for the first offense; and by six months' imprisonment for provisions* of article three of said chapter is guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 409. Making, etc., dangerous weapons.—A person who manufactures, or causes to be manufactured, or sells or keeps for sale, or offers, or gives, or disposes of any instrument or weapon of the kind usually known as slungshot, billy, sand-club or metal knuckles, or who, in any city or incorporated village in this state, without the written consent of a police magistrate, sells or gives

* So in the original.

any pistol or other firearm to any person under the age of eighteen years, is guilty of a misdemeanor.

§ 410. **Carrying, etc., certain weapons.**—A person who attempts to use against another, or who, with intent so to use, carries, conceals or possesses any instrument or weapon of the kind commonly known as the slung-shot, billy, sandclub or metal knuckles, or a dagger, dirk or dangerous knife, is guilty of a felony. Any person under the age of eighteen years, who shall have, carry or have in his possession in any public street, highway or place in any city or incorporated village in this state, without a written license from a police magistrate of such city or incorporated village, any pistol or other firearm of any kind, shall be guilty of a misdemeanor. This section shall not apply to the regular and ordinary transportation of firearms as merchandise, or for use without the city or village limits.

§ 411. **Possession, presumptive evidence.**—The possession, by any person other than a public officer, of any of the weapons specified in the last section, concealed or furtively carried on the person, is presumptive evidence of carrying, or concealing, or possessing, with intent to use the same in violation of that section.

§ 412. *Repealed Laws 1882, chap. 384, page 544.*

§ 413. **Negligently managing and refusing to extinguish fires.**—A person who:

1. Willfully or negligently sets fire to, or assists another to set fire to any waste or forest lands belonging to the state or to another person whereby such forests are injured or endangered; or

2. Negligently sets fire to his own woods, by means whereof the property of another is endangered; or

3. Negligently suffers any fire upon his own land to extend beyond the limits thereof; or

4. Having been lawfully ordered to repair to a place of a fire in the woods, and to assist in extinguishing it, omits without lawful excuse to comply with the order, is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1893; Laws 1893, ch. 692.

§ 414. **Obstructing attempts to extinguish fires.**—A person who at any burning of a building is guilty of any disobedience to lawful orders of a public officer or fireman, or of any resistance to, or interference with, the lawful efforts of a fireman or company of firemen, to extinguish the same, or of any disorderly conduct likely to prevent the same from being extinguished, or who forbids, prevents or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

In effect, as amended, May 18, 1892; Laws 1892, ch. 692.

§ 415. **Ferries.**—A person who:

1. Maintains a ferry for profit or hire upon any of the waters of this state without authority of law; or,

2. Having entered into a recognizance to keep or maintain a ferry, violates the condition of such recognizance; is guilty of a misdemeanor.

Where such ferry is upon waters dividing two counties, the offender may be prosecuted in either county.

In effect, as amended, May 18, 1892; Laws 1892, ch. 692.

§ 415a. **Penalty for neglect to post schedule of ferry rates.**—A person, corporation or association operating any ferry in this state, or between this state and any other state, operating from or to a city of five hundred thousand inhabitants or over, posting a false schedule of ferry rates, or neglecting to post in a conspicuous and accessible place in each of its ferry-houses, in plain view of the passengers, a schedule, plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged for ferriage over such ferry, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; in effect Oct. 1, 1893.

§ 416. **Unlawful acts of and neglect of duty by railroad officials.**—An officer, agent, attorney or employe, of a railroad corporation, who :

1. Offers a place, appointment, position or any other consideration to a railroad commissioner or to a secretary, clerk, agent, employe or expert employed by the board of railroad commissioners; or

2. After due notice, neglects or refuses to make or furnish any statement or report lawfully required by the board of railroad commissioners or willfully hinders, delays or obstructs such commissioners in the discharge of their official duties,

Is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1893; Laws 1893, ch. 692.

A person whose ferry privilege is disturbed cannot bring an action on the case; his remedy is to sue for the penalty given by statute. *Almy v. Harris*, 5 Johns. 175.

To maintain a ferry upon Niagara river, unless authorized by law, will subject the offender to punishment as for a misdemeanor. *People v. Babcock*, 11 Wend. 587.

The maintaining by a railroad corporation of a ferry upon which it regularly transports persons other than its own passengers is an invasion of the statute. *Aikin v. West. R. Co.*, 20 N. Y. 370. See, also, 9 Wheat. (U. S.) 1.

§ 417. **Misconduct of railroad commissioners and of their employes.**—Any railroad commissioner, or any secretary, clerk, agent, expert or other person employed by the board of railroad commissioners, who :

1. Directly or indirectly solicits or requests from or recommends to any railroad corporation, or to any officer, attorney or agent thereof, the appointment of any person to any place or position; or,

2. Accepts, receives or requests, either for himself or for any other person, any pass, gift or gratuity from any railroad corporation; or,

3. Secretly reveals to any railroad corporation, or to any officer, member, or employe thereof, any information gained by him from any other railroad corporation; is guilty of a misdemeanor.

In effect, as amended, May 18, 1892; Laws 1892, ch. 692.

§ 418. Persons unable to read not to act or be employed as engineers.—Any person unable to read the timetables of a railroad and ordinary handwriting, who acts as an engineer or runs a locomotive or train on any railroad in this state; or any person who in his own behalf, or in behalf of any other person or corporation, knowingly employs a person so unable to read to act as such engineer or to run any such locomotive, is guilty of a misdemeanor. [*As amended, in effect May 18, 1892.*]

§ 419. Misconduct of officials or employes on elevated railroads.—Any conductor, brakeman, or other agent or employe of an elevated railroad, who :

1. Starts any train or car of such railroad, or gives any signal or order to any engineer or other person to start any such train or car, before every passenger therein who manifests an intention to depart therefrom by arising, or moving toward the exit thereof, has departed therefrom; or before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train, has actually boarded or entered the same, unless due notice is given by an authorized employe of such railroad that the train is full, and that no more passengers can then be received; or,

2. Obstructs the lawful ingress or egress of a passenger to or from any such car; or,

3. Opens a platform gate of any such car while the train is in motion, or starts such train before such gate is firmly closed; is guilty of a misdemeanor. [*As amended, in effect May 18, 1892.*]

§ 420. Intoxication or other misconduct of railroad or steamboat employes.—1. Any person who, being employed upon any railroad as engineer, conductor, baggagemaster, brakeman, switchtender, fireman, bridge-tender, flagman, signal man, or having charge of stations, starting, regulating or running trains upon a railroad, or, being employed as captain, engineer or other officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any such duties; or

2. An engineer, conductor, brakeman, switch-tender, or other officer, agent or employe of any railroad corporation, who willfully violates or omits his duty as such officer, agent or employe,

by which human life or safety is endangered, the punishment of which is not otherwise prescribed; is guilty of a misdemeanor. [*As amended, in effect May 18, 1892.*]

§ 421. **Failure to ring bell, etc.**—A person, acting as engineer driving a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle, upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing such bell, or sounding such whistle at intervals, until such locomotive, and the train to which the locomotive is attached, shall have completely crossed such road or street, or any officer or employe of a corporation who shall willfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive or car for a longer period than five consecutive minutes, is guilty of a misdemeanor. [*In effect September 1, 1891.*]

See 3 Birdseye's Stat. 2455; *Powell v. Railroad Co.*, 14 State Rep'r, 912.

A company, under the act of 1850, incurs the penalty prescribed as often as they neglect to give the required signal in the prescribed manner. *People v. N. Y. C. R. Co.*, 25 Barb. 199.

The required signal must be given at each crossing though the railroad and the street are not on the same level. *People v. Railroad Co.*, 13 N. Y. 78.

The provision of the general railroad act (Laws 1850, chap. 140, § 33) was repealed by act of 1886, chap. 593, p. 840.

§ 422. **Placing passenger car in front of baggage car.**—A person, being an officer or employe of a railway company, who knowingly places, directs, or suffers a freight, lumber, merchandise or oil car to be placed in rear of a car used for the conveyance of passengers in a railway train, is guilty of a misdemeanor

See *Bushley v. Railroad Co.*, 107 N. Y. 374.

§ 423. **Platforms and heating apparatus of passenger cars.**—A railroad corporation, or any officer or director thereof having charge of its railroad, or any person managing a railroad in this state, or any person or corporation running passenger cars upon a railroad into or through this state, who:

1. Fails to have the platforms or ends of the passenger cars run upon such railroad constructed in such manner as will prevent passengers falling between the cars while in motion; or,

2. Except temporarily, in case of accident or emergency, heats any passenger car, while in motion, on any such railroad more than fifty miles in length, except a narrow-gauge railroad which runs only mixed trains, between October fifteenth and May first, by any stove or furnace inside of or suspended from such car, except stoves of a pattern and kind approved by the board of railroad commissioners for cooking purposes in dining-room cars, and except within the extended time allowed by the railroad commissioners in pursuance of law for introducing other heating apparatus; is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 424. **Guard posts; automatic couplers.**—All corporations and persons other than employes, operating any steam railroad in this state,

1. Failing to cause guard posts to be placed in the prolongation of the line of bridge trusses upon such railroad, so that in case of derailment, the posts and not the trusses shall receive the blow of the derailed locomotive or car; or

2. Failing after November 1st, 1892, to equip all of their own engines and freight cars, run and used in freight or other trains on such railroad, with automatic self-couplers, or running or operating on such railroad any freight car belonging to any such person or corporation, without having the same equipped, except in case of accident or other emergency, with automatic self-couplers, and except within the extended time allowed by the board of railroad commissioners, in pursuance of law, for equipping such car with such couplers; is guilty of a misdemeanor, punishable by a fine of five hundred dollars for each offense. [*As amended; in effect May 18, 1892.*]

§ 425. **Officers of railroad companies to be uniformed.**
— A person who,

1. Advises or induces any one, being an officer, agent or employe of a railway company, to leave the service of such company, because it requires a uniform to be worn by such officer, agent or employe, or to refuse to wear such uniform, or any part thereof; or,

2. Uses any inducement with a person employed by a railway

company to go into the service or employment of any other railway company, because a uniform is required to be worn; or,

3. Wears the uniform designated by a railway company without authority;

Is guilty of a misdemeanor.

§ 426. Riding on freight trains.— A person who,

1. Rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company or of the person in charge of the car or engine; or,

2. Who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger; or,

3. Who willfully obstructs, hinders or delays the passage of any car lawfully running upon any steam or horse or street railway;

Is guilty of a misdemeanor.

§ 427. Dangerous exhibitions; bathing.— A person who, being lessee or occupant of any place of amusement; or any plot of ground or building, uses it or allows it to be used for the exhibition of skill, in throwing any sharp instrument at or toward any human being, or aims or discharges any bowgun, pistol or firearm of any description whatever, or allows one to be aimed or discharged at or towards any human being, or who, being owner, lessee, proprietor or manager of any surf-bathing place, neglects at any time during the bathing season to maintain surf or life boats, or other life-saving apparatus, duly equipped and manned in the manner and to the extent prescribed by law, is guilty of a misdemeanor.

§ 428. Fires and lights on vessels in certain counties.— A person who violates any of the provisions of an act to prevent conflagrations, passed May 19, 1879, is guilty of a misdemeanor, triable as therein prescribed.

§ 429. Duty of guarding ice cuttings; how long such guards must be maintained; violation of duty to maintain guards around ice cuttings.— A person or corporation

cutting ice in or upon any waters within the boundaries of this state, for the purpose of removing the ice for sale, must surround the cuttings and openings made, with fences of bushes or other guards sufficient to warn all persons of such cuttings and openings. Which fences or guards must be erected at or before the time of commencing the cuttings or openings, and must be maintained until ice has again formed therein to the thickness of at least six inches. Whoever omits to comply with this section, is guilty of a misdemeanor.

§ 429a. **Detaching ice for bridge forbidden.**—A person who cuts, loosens or detaches from any bay, estuary, inlet or main, or island shore of the St. Lawrence river, within the jurisdiction of this state, any field of ice, or large body of ice, for the purpose or with the intent of using the same as a bridge or passage way between an island of the river and the main shore, or between any islands of such river, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 430. **Articles in imitation of food.**—A person, who sells or manufactures, exposes or offers for sale as an article of food, any substance in imitation thereof, without disclosing the imitation by a suitable and plainly visible mark or brand, is guilty of a misdemeanor.

§ 431. **Noisome or unwholesome substances, &c., in highway.**—A person who deposits, leaves or keeps, on or near a highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or establishes, maintains or carries on, upon or near a public highway or route of public travel, either on the land or on the water, any business, trade or manufacture which is noisome or detrimental to public health, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months, or both.

§ 432. **Ambulances.**—A person, who willfully stops or obstructs the passage of any ambulance or vehicle used for the transportation of sick or wounded persons or animals upon any public street, highway or place, or who willfully injures the same, or willfully drives any vehicle into collision therewith, is guilty of a misdemeanor. All sheriffs, constables and police officers must, when called upon by the persons in charge of such ambulance or vehicle, aid in placing sick or wounded persons or animals therein, and in enforcing the provisions of this section.

§ 433. **Using net or weir unlawfully in Hudson river.**—A person, who uses any net or weir for setting or attaching nets, or a pole or other fixture in any part of the river Hudson, except as permitted by statute, is guilty of a misdemeanor.

§ 433a. **Lights upon swing bridges.**—A corporation, company or individual, owning, maintaining or operating a swing bridge

across the Hudson river, who during the navigation season between sundown and sunrise, neglects to keep and maintain upon every such bridge the lights required by law, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 434. **Exposing person affected with a contagious disease in a public place.**—A person, who willfully exposes himself or another, affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his necessary removal in a manner not dangerous to the public health, is guilty of a misdemeanor.

§ 435. **False rumors as to public funds, etc.**—A person who, with intent to affect the market price of the public funds of this state or of the United States, or of any state or territory thereof, or of a foreign country or government, or of the stocks, bonds, or other evidences of debt of a corporation or association, or the market price of gold or silver coin or bullion, or any merchandise or commodity whatever,

1. Without lawful authority, falsely signs the name of an officer of a corporation, or of any other person to a letter, message, or other paper; or

2. Utters or circulates such a letter, message, or paper, knowing that the same has been so falsely signed; or

3. Knowingly circulates any false statement, rumor, or intelligence;

Is punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or both.

§ 436. **Eavesdropping.**—A person, who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor.

§ 437. **Destroying invoice.**—A person, who willfully destroys or suppresses an invoice, bill of lading, or other document, writing or thing whatever, which tends to show the ownership of wrecked property, is guilty of a misdemeanor.

§ 438. **False labels.**—A person, who with intent to defraud, either

1. Puts upon an article of merchandise, or upon a cask, bottle, stopper, vessel, case, cover, wrapper, package, band, ticket, label, or other thing, containing or covering such an article, or with which such an article is intended to be sold, or is sold, any false description or other indication of or respecting, the kind, number, quantity, weight or measure of such article, or of any part thereof; or the place or country where it was manufactured or produced; or the quality or grade of any such article, if the quality or grade thereof is required by law to be marked, branded, or otherwise indicated on or with such article; or

2. Sells or offers for sale an article, which to his knowledge is falsely described or indicated upon any such package or vessel

containing the same, or label thereupon, in any of the particulars specified, or

3. Sells or exposes for sale any goods in bulk to which no name or trade-mark shall be attached, and orally or otherwise represents that such goods are the manufacture or production of some other than the actual manufacturer or producer, in a case where the punishment for such offense is not specially provided for otherwise by statute,

Is guilty of a misdemeanor.

See *Materne v. Horwitz*, 101 N. Y. 469.

To render a person liable under this section, there must be shown an intent to defraud some person or body corporate by the use of the false label, etc. *Low v. Hall*, 47 N. Y. 104. See, also, *Mayor, etc., v. Nichols*, 4 Hill, 209; *Rudder v. Huntington*, 3 Sandf. 252; *Brown v. Mercer*, 37 N. Y. Super. 265.

Courts of equity will interfere to prevent one person from simulating the label of another, if it is such as is likely to deceive an ordinarily careful person. *Knight v. Cunningham*, 6 Hun, 196; *Williams v. Spence*, 25 How. 366.

§ 438a. **Using false marks as to manufacture.**—A person who, with intent to defraud or to enable another to defraud any person, manufactures or knowingly sells or causes to be manufactured or sold, any article, marked, stamped or branded, or encased or inclosed in any box, bottle or wrapper, having thereupon any engraving or printed label, stamp, imprint, mark or trade mark, which article is not the manufacture, workmanship or production of the person named, indicated or denoted by such marking, stamping or branding, or by or upon such engraving, printed label, stamp, imprint, mark or trade mark, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 438b. **Penalty for selling half wine not labeled.**—A person who sells, offers for sale or manufactures with intent to sell, any wine known as "half wine," which is not stamped, marked or labeled, as required by law, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 439. **Skimmed milk.**—A person who sells, or offers for sale, milk from which the whole or part of the cream has been skimmed or removed, without disclosing the fact, or having a mark or label, plainly and legibly stating the fact, conspicuously affixed to every can or vessel containing the same, under circumstances not constituting an offense, for the punishment of which provision is otherwise specially made by statute, is guilty of a misdemeanor.

To authorize a conviction it must be averred in the indictment that the milk adulterated was designed for sale or exchange. *People v. Fauerback*, 5 Park. 311.

To render a party liable under this section, it must be shown that the offense was committed by his authority or with his knowledge and consent. *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314.

His knowledge, however, may be inferred from circumstances. *Id.*

§ 440. **Master of vessel bringing foreign convict.** — A person, being the master or commander of any vessel, or boat, arriving from a foreign country, who knowingly brings into this state a person who has been, or is a foreign convict of any offense, which, if committed in this state, would be punishable therein, is guilty of a misdemeanor.

§ 441. **Non-resident taking or planting oysters.** — A person, who not being at the time an actual inhabitant and resident of this state, plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters or other shell fish from their beds of natural growth, in any such waters on his own account or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars, or both.

In *People v. Lowndes*, 130 N. Y. 455, rev'g 55 Hun, 469, the indictment charged the planting of the oysters, but failed to allege that it was done for defendant's benefit or for the benefit of a non-resident employer. A demurrer, on the ground that the facts charged constitute no offense, was overruled; *held*, error.

§ 442. **Use of certain dredges.** — A person who uses a dredge or drag operated by steam, or any dredge or drag weighing over thirty pounds, for the purpose of catching, or taking oysters or other shell fish, in the waters of this state, is guilty of a misdemeanor.

§ 443. **Mock auctions.** — A person who buys or sells, or pretends to buy or sell, any goods, wares, or merchandise, or any species of property, except ships, vessels, or real or leasehold estate, exposed for sale by auction, if an actual sale, purchase, and change of ownership therein does not thereupon take place, is guilty of a misdemeanor, punishable by imprisonment for thirty days, or by fine not exceeding one hundred dollars, or both.

§ 444. **Interfering with navigation.** — A person who throws, or causes, or permits to be thrown, from any boat, scow, or other vessel, or in any other manner, into any of the navigable waters of this state, including bays, sounds and harbors, any earth, ashes, cinders, stone, or other material, or who builds any structure therein, which will in any manner lessen the depth of such waters, or interfere with the free and safe navigation thereof, is guilty of a misdemeanor.

§ 445. **Maintaining private insane asylums.**—A person who conducts or maintains a private insane asylum, or institution for the care or treatment of persons of unsound mind, without a license issued and granted to such person according to law, is guilty of a misdemeanor.

§ 446. **Entry into agricultural fair grounds.**—A person who wrongfully and fraudulently enters any agricultural fair grounds, without paying the entrance fee, is guilty of a misdemeanor.

§ 447. **Drugging person, etc.**—A person who administers any drug or stupefying substance to another, with the intent, while such person is under the influence thereof, to induce such person to enter the military or naval service of the United States, of this state, or any other state, country or government, is guilty of a misdemeanor.

§ 447a. **Negligently furnishing insecure scaffolding.**—A person or corporation employing or directing another to do or perform any labor in the erection, repairing, altering or painting any house, building or structure within this state, who knowingly or negligently furnishes or erects or causes to be furnished for erection for and in the performance of such labor, unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances not giving proper protection to the life and limb of any person so employed or engaged, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

TITLE XIII.

OF CRIMES AGAINST THE PUBLIC PEACE.

- SECTION 448.** Disturbing lawful meetings.
 449. "Riot" defined.
 450. Punishment of riot.
 451. Unlawful assemblages.
 452. Disguised and masked persons, etc.
 453. Allowing masquerades to be held in places of public resort.
 454. Remaining present at place of riot, etc., after warning.
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 456. Refusing to assist in arresting rioter.
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 458. Prize fighting, aiding therein, etc.
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 460. Betting or stakeholding on fight.
 461. Fight out of state.
 462. Indictment.
 463. 464. Apprehension of persons about to fight.
 465. Forcible entry and detainer.
 466. Returning to take possession of lands after being removed by legal process.
 467. Unlawful intrusion, etc.
 468. Discharging fire-arms.
 469. Witnesses' privilege.

§ 448. **Disturbing lawful meetings.**—A person who, without authority of law, willfully disturbs any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor.

As to disturbance of religious meetings, see §§ 274, 275; 1 Revised Statutes (Birdseye's Ed.), 881.

In *People v. Judson* (Astor Place Riots), 11 Daly, 1, 82, Judge Chas. P. Daly, in his charge to the jury, said: "The right of the people peaceably to assemble to discuss or deliberate upon matters of a public or private nature is one of those fundamental rights secured by the constitution itself, and the privilege of animadverting freely upon public men and public measures is an incident growing out of that right. This is plainly distinguishable, however, from assembling with an intent to commit violence upon persons or property, to resist the execution of the laws, to disturb public order, or for the perpetration of acts inspiring public terror or alarm. Any disturbance of public order by force is a breach of the peace. Any tumultuous assemblage of three or more persons brought together for no legal or constitutional object, deporting themselves in such manner as to endanger the public peace and excite terror and alarm in rational and firm-minded persons, is unlawful: and whenever three or more persons, in a tumultuous manner, use force or violence in the execution of any design wherein the law does not allow the use of force, they are guilty of a riot. A riot may be defined to be a tumultuous disturbance of the public peace by three or more persons assembled together of their own authority, mutually assisting each other against all who oppose them, and engaged in executing some design in a violent and turbulent manner, to the terror and alarm of by-standers or the neighborhood. The offenses comprehended within this general definition constitute three kinds of offenses—an unlawful assembly, a rout, and a riot. The unlawful assembly is where the parties come together with the intent before stated; rout is where they move forward to the execution of their design, and the riot takes place when they begin with force and violence to execute their design. Distinguishable from either of these offenses is the offense which is denominated an affray. An affray is when persons come together without a premeditated design to disturb the peace, and suddenly break out into a quarrel among themselves; and it is contradistinguished from a riot by being more of a private nature. Certain ingredients are insisted upon by the counsel for the accused, as entering into the composition of the offense of a riot. It is difficult to distinguish and fix with the accurateness of a definition, the precise boundaries which separate the particular offenses that grow out of the attempt to disturb or subvert public order. It is insisted upon by the counsel, that to constitute the offense of a riot, the parties must be engaged in the prosecution of a private purpose. In one sense this is true. The purpose is private, when it is to be distinguished from an armed attempt to overthrow and subvert the government by force and violence; as if, when the majority of the people have decreed a certain form of government, a portion of them, a minority, attempt to overthrow it by force. It is, moreover, insisted that there must be a concert of action. This is also true; but the concert of action may exist in the execution of the act. It is not necessary that

the parties should deliberate beforehand, that they should interchange views with each other, before commencing the execution of the design. * * * In a riot, all who participate are principals. It is an offense in which there must be three or may be many actors. The law does not distinguish between the relative degrees of violence used by individuals, but every one who participates is responsible for all that has taken place. The only discrimination which the law makes, is the discretion given to the court in apportioning the degree of punishment. It is not necessary that a party should do some physical act, such as throwing a stone. If a riot take place, all who aid, encourage or promote it, by words, signs, gestures or other acts, are principals. It is not necessary that a party should commit personal violence, being armed with offensive weapons, or making use of threatening speeches or turbulent gestures; any act of assistance or encouragement is sufficient to make him a principal."

§ 449. "Riot" defined. — Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.

A riot is such disorderly conduct in three or more persons assembled and actually accomplishing an object, as is calculated to terrify others. 2 Bish. Crim. Law (7th ed.). § 1143.

An unlawful assembly is a necessary ingredient of a riot. *State v. Stallcup*, 1 Ired. (Law), 30; 35 Am. Dec. 442.

A riot is a tumultuous disturbance of the peace by persons assembled by their own authority, with intent of putting their designs into execution in a violent manner. 6 Blackf. 365; *State v. Brooks*, 1 Hill, 361; 5 Ill. 180; 4 Ind. 599; 10 Mass. 518; 3 Rich. 337.

There must be force or violence or acts tending thereto. *Com. v. Runnels*, 10 Mass. 518; 11 Ind. 234; 33 Me. 554.

Any attempt to commit violence. 70 N. C. 66; *State v. Brazil*, 3 Rich. 337; *State v. Cole*, 2 McCord, 117.

It has been held that the originator of a riot is liable for the whole. *State v. Blau*, 13 Rich. 93; 3 Cox C. C. 288; *Slater v. Wood*, 9 Bosw. 15.

It requires no previous design or preconcert in order to constitute a riot; concert of action is enough. *People v. Ferris*, 4 Hall L. J. 209.

Mere presence at the scene of riot not enough; offender must have taken some active part. *Scott's Case*, 2 C. H. Rec. 25.

He who influences people's minds and induces them by violent means to accomplish an illegal object is himself a rioter, though he take no part in the riot. *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; 9 Crim. Law Mag. 829.

In *Rodman's Case*, 2 City Hall Rec. 88, while defendant was committing mischief in the street a crowd collected, but it did not appear that any person joined him in it. Held, that he was not guilty of riot.

Under a statute making violent and tumultuous conduct by three or more persons a riot, persons conducting a *charivari* or serenade with bells, horns, tin pans, guns, etc., are guilty of riot. *State v. Brown*, 69 Ind. 95; 35 Am. Rep. 210.

In *People v. White*, 55 Barb. 606, it was held that a charge on a trial for riot, "that if a crowd of three or more persons engage in an attack upon H. with a preconcerted intent to commit an assault and battery upon him and did accomplish the unlawful act, and the defendants or any of them participated in that unlawful proceeding, then they were guilty of the crime of riot," is correct.

§ 450. Punishment of riot. — A person guilty of riot, or of participating in a riot, either by being personally present, or by instigating, promoting, or aiding the same, is punishable as follows:

1. If the purpose of the assembly, or of the acts done or threatened or intended by the persons engaged, is to resist the enforcement of a statute of this state, or of the United States, or to obstruct any public officer of this state, or of the United States, in serving or executing any process or other mandate of a court of competent jurisdiction, or in the performance of any other duty; or if the offender carries, at the time of the riot, fire-arms or any other dangerous weapon, or is disguised; by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment;

2. In any other case, if the offender directs, advises, encourages, or solicits other persons, present or participating in the riot or assembly, to acts of force or violence, by imprisonment for not more than two years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment;

3. In any case, not embraced within the foregoing subdivisions of this section, by imprisonment for not more than one year, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

§ 451. Unlawful assemblies. — Whenever three or more persons

1. Assemble with intent to commit any unlawful act by force; or,

2. Assemble, with intent to carry out any purpose, in such a manner as to disturb the public peace; or,

3. Being assembled, attempt or threaten any act tending towards a breach of the peace, or an injury to person or property, or any unlawful act, such an assembly is unlawful, and every person participating therein by his presence, aid or instigation is guilty of a misdemeanor.

But this section shall not be so construed as to prevent the peaceable assembling of persons for lawful purposes of protest or petition.

See 2 Bish. Crim. Law (7th ed.), § 1256 *et seq.*; *People v. Most*, 128 N. Y. 108.

In *State v. Wood*, 9 Bosw. 15, the mayor of the city of New York claiming, but without right, to be the head of police of the city, organized a large body of men for the purpose of preventing the regular police force of the city from illegally ejecting a city officer from his office. *Held*, that such assemblage did not constitute an unlawful assembly. The court say: "An assembly is an unlawful one, where three or more persons assemble themselves together to do an illegal act." 4 Bl. Com. 146; 3 Inst. 176. So any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity of the neighborhood, is an unlawful assembly. *Reg. v. Vincent*, 9 C. & P. 91; *Reg. v. Neale*, *id.* 431. It is stated in elementary treatises and in adjudged cases, that the difference between an unlawful assembly and a riot is this: If the parties assemble in a tumultuous manner and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose which, if executed, would make them rioters, and having done nothing they separate without carrying their purpose into effect, it is an unlawful assembly. *Rex v. Birt*, 5 P. & C. 154; 4 Bl. Com. 146; 3 Inst. 176; 1 Russell Crimes (8th Am. ed.), 266, 272, 273; 2 Arch. Crim. Pl. (Waterman's ed.) 934, note 1, and pp. 937, 942 and 945."

§ 452. **Disguised and masked persons, etc.** — An assemblage in public houses or other places of three or more persons disguised by having their faces painted, discolored, colored or concealed, is unlawful, and every individual so disguised, present thereat, is guilty of a misdemeanor; but nothing contained in this section shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment, or any assemblage therefor of persons masked, or as prohibiting the wearing of masks, fancy dresses, or other disguise by persons on their way to or returning from such ball or other entertainment; if, when such masquerade, fancy dress ball or entertainment is held in any of the cities of this state, permission is first obtained from the police authorities in such cities respectively for the holding or giving thereof, under such regulations as may be prescribed by such police authorities.

§ 453. **Allowing masquerades to be held in places of public resort.** — A person being a proprietor, manager or keeper of a theater, circus, public garden, public hall, or other place of public meeting, resort or amusement, for admission to which any price or payment is demanded, who permits therein any assemblage of persons masked, prohibited in this title, is guilty of a misdemeanor, punishable by imprisonment in a state prison not exceeding two years, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars and not less than one thousand dollars, or by both such fine and imprisonment.

§ 454. **Remaining present at place of riot, etc., after warning.** — A person, remaining present at the place of an unlawful assembly or riot, after the persons assembled have been warned to disperse by a magistrate or public officer, is guilty of a misdemeanor, unless as a public officer, or at the request or command of a public officer, he is endeavoring or assisting to disperse the same, or to protect persons or property, or to arrest the offenders.

§ 455. **Remaining present at place of a meeting, originally lawful, after it has adopted an unlawful purpose.** — Where three or more persons assemble for a lawful purpose, and afterwards proceed to commit an act that would amount to a riot, if it had been the original purpose of the meeting, every person who does not retire when the change of purpose is made known, or such act is committed, except public officers and persons assisting them in attempting to disperse the assembly, is guilty of a misdemeanor.

§ 456. **Refusing to assist in arresting rioter.** — A person, present at the place of an unlawful assembly or riot, who, being commanded by a duly authorized public officer to act or aid in suppressing the riot, or in protecting persons or property, or in arresting a person guilty of or charged with participating in the unlawful assembly or riot, neglects or refuses to obey such command, is guilty of a misdemeanor.

See Code Crim. Proc., § 108.

§ 457. Combinations to resist execution of process. —

A person, who enters into a combination with another to resist the execution of any legal process, or other mandate of a court of competent jurisdiction, under circumstances not amounting to a riot, is guilty of a misdemeanor.

See Code Crim. Proc., §§ 102, 103.

§ 458. Prize fighting, aiding therein, etc. — A person who, within this state, engages in, instigates, aids, encourages or does any act to further a contention or fight without weapons between two or more persons, or a fight commonly called a ring or prize fight, either within or without the state, or who sends or publishes a challenge or acceptance of a challenge for such a contention or fight, or carries or delivers such a challenge or acceptance, or trains or assists any person in training or preparing for such a contention or fight, is guilty of a misdemeanor.

See § 234, *ante*.

§ 459. What is a challenge. — Any words spoken or written, or any signs uttered or made to any person, expressing or implying, or intended to express or imply a desire, request, invitation or demand to engage in any fight, such as is mentioned in section four hundred and fifty-eight, are to be deemed a challenge within the meaning of that section.

It is the province of the jury to determine whether the writing was intended as a challenge. *Wood's Case*, 3 C. H. Rec. 189.

What constitutes a challenge to fight a duel and its effect. *Barker v. People*, 3 Cow. 886; 20 Johns. 457; *People v. Barker*, 2 Wheel. C. C. 19; *Norton's Case*, 3 C. H. Rec. 90.

§ 460. Betting or stake-holding on fight. — A person who bets, stakes, or wagers money or other property upon the result of such a fight or encounter, or who holds or undertakes to hold money or other property so staked or wagered, to be delivered to or for the benefit of the winner thereof, is guilty of a misdemeanor.

§ 461. Fight out of state. — A person who leaves the state, with intent to elude any provision of this title, or to commit any act without the state which is prohibited by this title, or who, being a resident of this state, does any act without the state which would be punishable by the provisions of this title, if committed

within the state, is guilty of the same offense and subject to the same punishment, as if the act had been committed within this state.

See §§ 185, 239, *ante*; Code Crim. Proc., § 133.

§ 462. **Indictment.**—An indictment for an offense, specified in the last section, may be tried in any county within the state.

See § 240, *ante*; Code Crim. Proc., § 133.

§ 463. **Apprehension of persons about to fight.**—A magistrate having power to issue warrants in criminal cases, to whom it is made to appear that there is reasonable ground to apprehend that an offense specified in sections four hundred and fifty-eight, four hundred and sixty and four hundred and sixty-one is about to be committed within his jurisdiction, or by any person being within his jurisdiction, must issue his warrant to a sheriff or constable, or other proper officer, for the arrest of the person or persons so about to offend. Upon a person being arrested and brought before him by virtue of the warrant, he must inquire into the matter, and if it appears that there is reasonable ground to believe that the person arrested is about to commit any offense, the magistrate must require him to give a bond to the people of the state in such a sum, not exceeding one thousand dollars, as the magistrate may fix, either with or without sureties in his discretion, conditioned that such person will not, for one year thereafter, commit any such offense.

§ 464. **Apprehension of persons about to fight.**—If the person arrested, as prescribed in the last section, does not furnish a bond as prescribed therein, within a time fixed by the magistrate, the latter must commit him to the county jail, there to remain until discharged by a court of record having criminal jurisdiction. A person so committed may, at any time, be discharged upon a writ of *habeas corpus*, upon his executing the bond required by the committing magistrate. If the bond is required to be given with one or more sureties, the surety or sureties must be approved by the officer taking the same.

§ 465. **Forcible entry and detainer.**—A person guilty of using, or of procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or

other possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor.

To constitute a forcible entry and detainer, force is necessary; a naked trespass not sufficient. *People v. Smith*, 24 Barb. 16; *People v. Field*, 1 Lans. 232; *State v. Pearson*, 2 N. H. 550.

Any person in the peaceable possession of the lands at time of a forcible entry may proceed under the statute. *People v. Van Nostrand*, 9 Wend. 50; *People v. Carter*, 29 Barb. 208.

A party in possession may use force to repel an attempt to dispossess him without process. *Mickle's Case*, 1 C. H. Rec. 96; *Mickle v. Edwards*, id. 119.

An indictment must aver a seizin or possession on part of complainant. *People v. Shaw*, 1 Cal. 125; *People v. Reed*, 11 Wend. 157; *People v. Leonard*, 11 Johns. 504; *Carter v. Newbold*, 7 How. 166; *People v. Field*, 52 Barb. 198; 58 id. 270; 1 Lans. 232; *People v. Nelson*, 13 Johns. 840.

An averment of lawful possession is sufficient. *People v. Reed*, 11 Wend. 157.

A defendant may controvert the title of the prosecutor. *People v. Godfrey*, 1 Hall, 240; *People v. Rickert*, 8 Cow. 226; *People v. Wilson*, 13 How. 446; *Mather v. Hood*, 8 Johns. 44.

On an indictment for forcible entry and detainer the defendant may be convicted of detainer only. *People v. Anthony*, 4 Johns. 198; *People v. Rickert*, 8 Cow. 226; *People v. Godfrey*, 1 Hall, 240; *Matthews v. Ferstell*, 8 Leg. Inst. 22.

An indictment charging that defendant with force and arms unlawfully entered a dwelling-house named, and used force and violence in entering is sufficient without specifying the particular acts or means which constituted such force or violence. *People v. Farrell*, 28 State Rep. 43.

§ 466. **Returning to take possession of lands after being removed by legal process.** — A person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterwards, without authority of law, returns to settle or reside upon or take possession of such lands, is guilty of a misdemeanor.

§ 467. **Unlawful intrusion, etc.** — A person who intrudes upon any lot or piece of land within the bounds of the city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever, without such authority; and a person who places, erects or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor.

See, § 640, subd. 9, *post*.

This section is in substance a re-enactment of section 1, chapter 896, of the Laws of 1857.

This section does not include entries upon premises by persons under a *bona fide* claim of right. *People v. Stevens*, 109 N. Y. 159. The court say: "The statute, construed in view of the pre-existing law, was primarily intended to define what was previously known in the criminal law as a criminal trespass, as distinguished from a mere civil trespass. It may include some cases not before criminal, but this we need not consider. But to constitute a trespass on land an indictable offense, the distinguishing feature is an unlawful and criminal intent. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury. 1 Hale P. C. 509. It is not necessary to constitute the crime that the defendant does not know that the statute prohibits his act. It is sufficient if he does the act prohibited, when the statute makes the mere act itself unlawful. But where a particular intent is an ingredient of the crime, the mere doing of the prohibited act does not constitute the crime unless accompanied with unlawful intent. The cases of larceny, receiving stolen goods or passing counterfeit money are illustrations. The same act may in one case be larceny or forgery, or a guilty receiving of stolen property, and in another wholly innocent—depending on the intent. Section 467 of the Penal Code, defining the offense of intrusion on lands, does not it is true in terms make the intent a material element of the offense. But it cannot be supposed that the legislature intended to subject a person to criminal punishment, as when, for example, there being a dispute between neighbors as to the line between them, one moves his fence on to his neighbor's land, under a *bona fide* though mistaken belief that he was placing it on the true line; or where a lot-owner in a city or village, in erecting a building, encroaches innocently, although without authority, upon the street. Yet both of these cases are within the letter of the statute; but manifestly they are not within the statute, because looking at the reason of the thing—the ineffaceable distinction between innocence and crime and the antecedent law—the existence of a criminal intent as a necessary constituent of the offense must be implied."

An offer to show by defendant that before he took possession, he fully stated the facts to his counsel, who advised him that he had a right to take possession if he could do so without a breach of the peace, and that he entered in pursuance of such advice, honestly believing that he had a right to do so, was excluded. *Held*, no error. *People v. Stevens*, 109 N. Y. 159. On this point the court say: "When a party without authority enters into possession of a city lot, under an alleged contract of purchase which gave him no right to possession, and without having performed or offered to perform the contract on his part, it is not error to exclude evidence of the advice of counsel to show that he entered upon the premises under a *bona fide* claim of right. There was no colorable ground for any claim on the part of the defendant that he had any right or authority to enter upon the premises, arising out of the facts existing at the time. The facts were fully known to the defendant. Upon these facts there was no doubtful question of law, nor was the true conclusion to be drawn from the facts beyond the comprehension of any person of ordinary in-

telligence. Whatever advice may have been sought or accepted, there was a willful closing of the eyes to the truth if the defendant assumed to act upon advice that he was entitled to possession. It may have been supposed that the defendant would gain an advantage in the pending litigation if he could get into possession of the premises; but it is impossible that he could have believed that he was of right entitled to the possession. It is unnecessary to consider whether the advice of counsel, if honestly given, that the defendant was entitled to possession of the land, if accepted and acted upon in good faith, would constitute a defense. The circumstances do not permit this assumption in this respect."

§ 466. **Discharging fire-arms.**—A person who, otherwise than in self defense, or in the discharge of official duty,

1. Willfully discharges any species of fire-arms, air-gun or other weapon, or throws any other deadly missile in a public place or in any place where there is any person to be endangered thereby, although no injury to any person ensues; or

2. Intentionally, without malice, points or aims any fire-arm at or toward any other person; or

3. Discharges, without injury to any other person, fire-arms, while intentionally without malice, aimed at or toward any person; or

4. Maims or injures any other person by the discharge of any fire-arm pointed or aimed intentionally, but without malice, at any such person;

Is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1893; Laws 1893, ch. 692.

TITLE XIV.

OF CRIMES AGAINST THE REVENUE AND PROPERTY OF THE STATE.

SECTION 470. Misappropriation, etc., and falsification of accounts by public officers.

471. Other violations of law.

472. Misappropriation, etc., by county treasurer.

473. Officer authorized to make any sale, lease or contract, becoming interested under it.

474. County clerks omitting to publish statement required by law.

475. Obstructing officer in collecting revenue.

476. Delivering false bill of lading to canal collector.

477. Weighmaster making false entry of weight of canal boat.

478. Canal officer concealing frauds upon the revenue.

479. Willful injuries to the canals.

480. Drawing off water from canals.

SECTION 481. Canal officer accepting bribe to allow water to be drawn off from canals.

482. Fraudulent appropriation of lost treasure or waived property.

483. Injuries to the salt works.

484. Seizing military stores belonging to the state.

485. Making false statement in reference to taxes.

486a. School district trustee not to draw draft on supervisor in certain cases.

§ 470. Misappropriation, etc., and falsification of accounts by public officers. — A public officer, or a deputy, or clerk of any such officer, and any other person receiving money on behalf of, or for account of the people of this state, or of any department of the government of this state, or of any bureau or fund created by law, and in which the people of this state are directly or indirectly interested, or for or on account of any city, county, village or town, who

1. Appropriates to his own use, or to the use of any person not entitled thereto, without authority of law, any money so received by him as such officer, clerk or deputy, or otherwise; or,

2. Knowingly keeps any false account, or makes any false entry or erasure in any account of, or relating to, any money so received by him; or,

3. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or,

4. Willfully omits or refuses to pay over to the people of this state or their officer or agent authorized by law to receive the same, or to such city, village, county or town, or the proper officer or authority empowered to demand and receive the same, any money received by him as such officer when it is his duty imposed by law to pay over, or account for, the same;

Is guilty of felony.

See § 114, subd. 2, *ante*; § 515, *post*.

Pecculation of public funds, whether the offender be an agent, officer or servant having the funds or property charged to have been misappropriated, is covered by this section. *Bork v. People*, 91 N. Y. 5; *People v. Lyon*, 1 N. Y. Cr. Rep. 400.

§ 471. Other violations of law. — An officer or other person mentioned in the last section who willfully disobeys any provision of law regulating his official conduct, in cases other than those specified in that section is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding two years, or both.

§ 472. Misappropriation, etc., by county treasurer. —

A county treasurer, who willfully misappropriates any moneys, funds or securities, received by or deposited with him as such treasurer, or who is guilty of any other malfeasance or willful neglect of duty in his office, is punishable by a fine not less than five hundred dollars nor more than ten thousand dollars, or by imprisonment in a state prison not less than one year or more than five years, or by both such fine and imprisonment.

§ 473. Officer authorized to make any sale, lease or contract, becoming interested under it. —A public officer or school officer, who is authorized to sell or lease any property, or to make any contract in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, except in cases where such sale, lease or contract, or payment under the same, is subject to audit or approval by the superintendent of public instruction, is guilty of a misdemeanor.

§ 474. County clerks omitting to publish statement required by law. —A county clerk who willfully omits to publish any statement required by law, within the time prescribed, is guilty of a misdemeanor, punishable by a fine of one hundred dollars, or imprisonment for six months, or both.

§ 475. Obstructing officer in collecting revenue. —A person who willfully obstructs or hinders a public officer from collecting any revenue, taxes or other sum of money in which, or in any part of which the people of this state are directly or indirectly interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

§ 476. Delivering false bill of lading to canal collector. —A person whose duty it is to deliver to any collector of tolls upon any of the canals belonging to this state, a bill of lading of any property transported upon such canal, who delivers a false bill of lading as true, or makes or signs a false bill of lading, intending it to be delivered as true, knowing such bill to be false, is punishable by imprisonment in a state prison not exceed-

ing two years, or by a fine not exceeding three times the value of the property omitted in such bill, or both.

§ 477. **Weighmaster making false entry of weight of canal boat.**—A weighmaster upon any of the canals belonging to this state, and a clerk of such weighmaster, who makes a false entry of the weight of any boat, or cargo of any boat, navigating such canal, or who makes a false certificate of the light weight of any boat, knowing such entry or certificate to be false, is guilty of a misdemeanor.

§ 478. **Canal officer concealing frauds upon the revenue.** A public officer or agent employed by the people of this state in relation to the canals belonging to this state, who knows, or has good reason to believe that any fraud upon the revenues of the canals has been committed or attempted, and who omits to disclose the same, and enforce the penalties therefor, if within his power, is guilty of a misdemeanor.

§ 479. **Willful injuries to the canals.**—A person who, without authority of law, willfully inflicts an injury upon any of the canals belonging to this state, or disturbs or injures any of the boats, locks, bridges, buildings, machinery or other works or erections connected with any such canal, and in which the people of this state have an interest, is guilty of felony.

A person does not incur any penalty by driving upon the tow-path of the canal. *Smith v. Clark*, 3 Lans. 208.

§ 480. **Drawing off water from canals.**—A person who draws water from any canal in this state, or from a feeder or reservoir of any canal, during the season of navigation of the canal, and to the detriment or injury of the navigation thereof, without authority of law, is punishable by imprisonment in a county jail not less than one year, and by a fine not less than one thousand dollars.

See *Sipple v. State*, 99 N. Y. 289; 16 Abb. N. C. 434.

No person, except by authority of the legislature, or of the authorized agents of the state, has a right to tap the state dam, and draw off the waters of the artificial pond which is created by such dam for public purposes. *Varick v. Smith*, 5 Paige, 136. See, also, *Robinson v. Chamberlain*, 34 N. Y. 400; *Lynch v. Stone*, 4 Den. 356; *Ex parte Miller*, 2 Hill, 418.

§ 481. Canal officer accepting bribe to allow water to be drawn off from canals. — A public officer or agent employed by the people of this state in relation to the canals belonging to the state, or a contractor for canal repairs, or person having charge of any canal, or any part thereof, or of any lock, waste-weir, feeder or other work belonging thereto, or being employed thereon, who asks, or accepts or promises to accept any bribe as an inducement to permit water to be drawn from a canal, feeder or reservoir in violation of the last section; and a person who gives, or offers or promises to give to any officer or person above mentioned, any bribe as an inducement to him to permit water to be drawn from any canal, feeder or reservoir in violation of this section, is guilty of a misdemeanor.

§ 482. Fraudulent appropriation of lost treasure, or waived property. — A person who fraudulently conceals or appropriates to his own use any lost treasure or any waived property belonging to this state by virtue of its sovereignty, is guilty of a misdemeanor.

§ 483. Injuries to the salt works. — A person who willfully burns, destroys, or injures any salt manufactory connected with the Onondaga salt springs, or any building appurtenant to such manufactory or any part of such manufactory, or any of the buildings, reservoirs, pumps, conductors or water conduits, belonging to this state, used in the raising of salt water for the manufacture of salt, without authority of law, is punishable by imprisonment in a state prison not exceeding five years.

§ 484. Seizing military stores belonging to the state. A person who enters any fort, magazine, arsenal, armory, arsenal yard or encampment, and seizes or takes away any arms, ammunition, military stores or supplies belonging to the people of this state; and a person who enters any such place with intent so to do, is punishable by imprisonment in a state prison not exceeding ten years.

§ 485. Making false statement in reference to taxes. — A person who, in making any statement, oral or written, which is required or authorized by law to be made as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, willfully makes, as to any material matter, any statement which he knows to be false, is guilty of a misdemeanor.

§ 485a. School district trustee not to draw draft on supervisor in certain cases.—A school district trustee who issues an order or draws a draft on a supervisor or collector for any money, unless there is at the time sufficient money in the hands of such supervisor or collector belonging to the district to meet such order or draft, is guilty of a misdemeanor.

Added Laws 1898, ch. 692; takes effect October 1, 1898.

TITLE XV.

OF CRIMES AGAINST PROPERTY.

CHAPTER I. Arson.

- II. Burglary and housebreaking.
- III. Forgery and counterfeiting.
- IV. Larceny, including embezzlement.
- V. Extortion.
- VI. False personation and cheats.
- VII. Fraudulently fitting out and destroying ships and vessels.
- VIII. Fraudulent destruction of property insured.
- IX. False weights and measures.
- X. Fraudulent insolvencies by individuals.
- XI. Fraudulent insolvencies by corporations, and other frauds in their management.
- XII. Frauds in the sale of passage tickets.
- XIII. Frauds relative to documents of title to merchandise.
- XIV. Malicious mischief.

CHAPTER I.

ARSON.

- SECTION 486.** Arson in first degree defined.
 487. Id.; in second degree.
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 489. Arson, how punished.
 490. Intent to destroy building requisite.
 491. Contiguous buildings.
 492. "Night-time" defined.
 493. "Building," defined.
 494. "Inhabited building," defined.
 495. Ownership of building.

§ 486 Arson in first degree defined.—A person who willfully burns, or sets on fire, in the night time, either

1. A dwelling-house in which there is, at the time, a human being; or

2. A car, vessel, or other vehicle, or a structure or building other than a dwelling-house, wherein, to the knowledge of the offender, there is, at the time, a human being;

Is guilty of arson in the first degree.

Setting fire to a building usually occupied by persons lodging therein is arson in the first degree, though not a dwelling-house in the ordinary acceptation of the term. *People v. Orcut*, 1 Park. 252.

It is arson in the first degree that the occupant of a house was present therein when the house took fire, though previously aroused by the alarm. *Woodford v. People*, 3 Hun, 310.

Where fire is communicated to an adjoining building, a party may be indicted for firing the latter. *Hennessy v. People*, 21 How. 239.

Setting fire to an inhabited dwelling-house is arson, though only a part of it be consumed. *People v. Butler*, 16 Johns. 203.

Dwelling of tenant is well described as his dwelling, though the owner occupy part of it. *People v. Henderson*, 1 Park. 560.

Where the prisoner fired a single house, and thirty-five were destroyed, he is properly indicted for firing the whole. *Woodford v. People*, 3 Hun, 310.

A charge that the house burned was the property of a person named is a sufficient allegation of ownership. *Woodford v. People*, 62 N. Y. 117.

In *Levy v. People*, 80 N. Y. 327, the indictment charged the prisoner as accessory to the crime of arson in the first degree; it is charged that the fire was set by the principals in the night-time and burned the dwelling-house of K., in which he then was. It appeared that the building was a five-story tenement-house, having a common entrance in the front and in the rear. The front entrance opened into a hall-way, used in common, and the apartments in the several floors opened into a common hall. The prisoner with his wife occupied three rooms; K. with his family occupied three adjoining rooms; there was no direct communication between the rooms of K. and those occupied by the prisoner; the fire was set in the prisoner's rooms and burned portions of them. *Held*, that the indictment was well drawn; that the building was a dwelling-house, and was the dwelling-house of K. within the meaning of the statute defining arson in the first degree.

§ 487. Arson in second degree. — A person who,

1. Commits an act of burning in the day-time, which, if committed in the night-time, would be arson in the first degree; or,

2. Willfully burns, or sets on fire, in the night-time, a dwelling-house wherein at the time there is no human being; or,

3. Willfully burns, or sets on fire, in the night-time, a building not inhabited, but adjoining or within the curtilage of an inhabited building, in which there is, at the time, a human being, so that the inhabited building is endangered, even though it is not in fact injured by the burning; or,

4. Willfully burns, or sets on fire, in the night-time, a car, vessel, or other vehicle, or a structure or building, ordinarily occupied at night by a human being, although no person is within it at the time;

Is guilty of arson in the second degree.

To convict of arson in the second degree it must be shown that the building touched another, or was within the curtilage thereof. *Peeverley v. People*, 3 Park. 59. See, also, *Roberts' Case*, 2 East P. C. 1030; *Isaac's Case*, id. 1031; *Res v. Pelley*, Leach C. C. 277; *Rex v. Fletcher*, 2 Car. & K. 215; 2 Russ. 550; *State v. McLaughlin*, 8 Jones, 354; *People v. Taylor*, 2 Mich. 250.

Defendants, who were husband and wife, were indicted for arson in the second degree. It appeared that a fire, which was without doubt of incendiary origin, took place in premises of which they were the tenants, and upon which there was a policy of fire insurance in the wife's name. Defendants testified that they left the premises together upon the morning of the day upon which the fire took place; that the husband returned for a moment without his wife to secure an article which he had forgotten; that they did not return until after the fire had occurred; that they did not place the evidence of incendiarism on the premises and were ignorant of how they came there. The court charged the jury as follows: "There has been no special claim made in reference to the wife in this case. It is claimed by defendants' counsel that they are both innocent; and it is fair to say, under the evidence, if one is convicted both should be. * * * There is no evidence that the husband was in the premises alone long enough to create the condition of things which was discovered. Therefore I say to you that your verdict in this case should be guilty or not guilty as to both defendants. The circumstances are substantially the same as to both." *Held*, error. *People v. McGrath*, 5 N. Y. Cr. Rep. 4; 4 N. Y. State Rep. 620.

Among other objectionable features, this charge prevents the jury from entertaining a reasonable doubt of the guilt of one defendant, if they have no such doubt as to that of the other. *Id.*

To convict of arson in second degree it is necessary that the building set on fire actually touched an inhabited dwelling, or that it was within the curtilage thereof. *Peeverley v. People*, 3 Park. 59.

A prisoner may be convicted of arson in second degree under an indictment charging that offense, though the facts would have justified a conviction of a higher grade of crime under an indictment properly framed. *People v. Durkin*, 5 Park. 243.

§ 488. **Arson in third degree.** — A person who willfully burns, or sets on fire, either,

1. A vessel, car, or other vehicle, or a building, structure, or other erection, which is at the time insured against loss or damage by fire, with intent to prejudice the insurer thereof; or,

2. A vessel, car, or other vehicle, or a building, structure, or other erection, under circumstances not amounting to arson in the first or second degree;

Is guilty of arson in the third degree.

Where in an indictment for arson in the third degree, for burning a building with intent to defraud the insurer thereof, the insurer is named, its residence, mode of incorporation and manner of establishment may be shown though not specifically averred. *Carncross v. People*, 1 N. Y. Cr. Rep. 518.

It must be averred that the house was insured against loss by fire, and that the offense was committed with intent to defraud the insurers. *People v. Henderson*, 1 Park. 560; *Sheppard v. People*, 19 N. Y. 537.

Under an indictment for arson in first degree there can be no conviction of arson in third degree. *Dedieu v. People*, 23 N. Y. 178; reversing 4 Park. 593, and overruling *Hennessey v. People*, 21 How. 239.

Otherwise, if it be shown that the prisoner actually set fire to the house with intent to defraud the insurer. *Freund v. People*, 5 Park. 198. See *McGary v. People*, 45 N. Y. 153.

On a trial for arson, where the evidence was chiefly circumstantial, defendant being the president and owner of most of the stock of the company whose building was burned, proofs of loss which he executed as president jointly with the treasurer of the company, for the purpose of collecting the insurance money on the property, giving the total amount of insurance on the property, and stating the cause of the fire, in the opinion of affiant, to be incendiarism, were held admissible in evidence as part of the *res gesta*. *People v. O'Neill*, 112 N. Y. 355.

Evidence was admissible of defendant's drinking liquor subsequent to the fire, as bearing upon the question of guilt, in tending to show what was his conduct and demeanor when engaged in matters connected with the fire, and in the course and disposition of which he was principally interested and a prominent actor. *People v. O'Neill*, 112 N. Y. 355, citing *Greenfield v. People*, 85 id. 85.

For a case where the facts were held insufficient to sustain the verdict, see *People v. Newton*, 3 N. Y. Cr. Rep. 406.

§ 489. **Arson, how punished.**—Arson is punishable as follows:

1. In the first degree, by imprisonment for any term not less than ten years;
2. In the second degree, by imprisonment for a term not exceeding fifteen years;
3. In the third degree, by imprisonment for a term not exceeding seven years. [*Amended; in effect May 17, 1892.*]

§ 490. **Intent to destroy building requisite.**—The burning of a building under circumstances which shows beyond a reasonable doubt that there was no intent to destroy it, is not arson.

See *People v. Long*, 2 Edm. Sel. Cas. 129.

Where it is clearly made out that the firing was willful, the intention or motive of the accused is of no moment, and his intoxication is not only no extenuation of the offense, but is not even to be considered in inquiring into his capacity at the time to have a motive or intention. *People v. Jones*, 2 Edm. Sel. Cas. 86.

§ 491. **Contiguous buildings.** — Where an appurtenance to a building is so situated with reference to such building, or where any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other, within the foregoing provisions, against any person actually participating in the original setting on fire, as of the moment when the fire from the one communicates to and sets on fire the other.

The word "contiguous" is a relative term, and when employed in reference to a building, evidently means in close proximity to the same. *Arkell v. Ins. Co.*, 60 N. Y. 193.

If a person sets fire to a building which communicates to an adjoining one, he may be convicted of firing the latter. *Hennessey v. People* 21 How. Pr. 239; overruled on other grounds in 22 N. Y. 178.

Where the prisoner set fire to a house, and thirty-five were burned, he was properly indicted for firing all. *Woodford v. People*, 8 Hun, 810; 63 N. Y. 117.

A building twenty-five feet from another is not "contiguous" to it. *Olsen v. Ins. Co.*, 35 Minn. 432; 59 Am. Rep. 333.

§ 492. **"Night-time" defined.** — The words "night-time," as used in this chapter, include the period between sunset and sunrise, and every building or structure, which shall have been usually occupied by persons lodging therein at night, is a dwelling-house within the meaning of this chapter.

§ 493. **"Building," defined.** — Any house, vessel, or other structure, capable of affording shelter for human beings, or appurtenant to, or connected with a structure so adapted, is a "building" within the meaning of this chapter.

See § 504, *post*.

Any edifice capable of affording shelter to human beings is a building. 51 Cal. 320; 84 id. 245; *State v. Johnson*, 48 Ga. 116.

It need not be finished. 12 Cox C. C. 106.

Its state of completeness is a question of fact. 1 Met. 256; 12 Cox C. C. 106.

The remains of a wooden house after a fire is not a building. 23 Up. Can. Q. B. 492.

A church building or school-house are within the statute. 1 Leach, 318; 3 Root, 516; 4 Gill & J. 402; *State v. O'Toole*, 29 Conn. 342.

In arson, house, shop and workshop have the same meaning as in burglary, 5 Up. Can. Q. B. (O. S.) 522; *Com. v. Barney*, 10 Cush. 478.

§ 494. **"Inhabited building," defined.** — A building is deemed an "inhabited building" within the meaning of this chapter, any part of which has usually been occupied by a person lodging therein at night.

A jail is an "inhabited building" within the meaning of this section. *People v. Cottrel*, 18 Johns 115; *Smith v. State*, 23 Tex. App. 857; 59 Am. Rep. 778. See, also, Bish. Stat. Crimes (2d ed.), § 207, n.

§ 495. **Ownership of building.** — To constitute arson it is not necessary that another person than the defendant should have had ownership in the building set on fire.

A person may be guilty of arson in burning his own building. *Sheppard v. People*, 19 N. Y. 537; *People v. Van Blaricum*, 2 Johns. 105; *People v. Smith*, 8 How. 226; *State v. Taylor*, 45 Me. 322.

CHAPTER II.

BURGLARY.

SECTION 496. Burglary in first degree defined.

497. Burglary in second degree.

498. Burglary in third degree.

499. "Break" defined.

500. "Night-time" defined.

501. "Enter" defined.

502. "Dwelling-house" defined.

503. Dwelling-houses, etc., when deemed separate.

504. "Building" defined.

505. Unlawfully entering building.

506. Burglar punishable separately for crime in building.

507. Burglary, how punished.

508. Possessing burglar's instruments, etc.

§ 496. **Burglary in first degree defined.** — A person who, with intent to commit some crime therein, breaks and enters, in the night-time, the dwelling-house of another, in which there is at the time a human being,

1. Being armed with a dangerous weapon; or,
2. Arming himself therein with such a weapon; or,
3. Being assisted by a confederate actually present; or,
4. Who, while engaged in the night-time in effecting such entrance, or in committing any crime in such a building, or in escaping therefrom assaults any person;

Is guilty of burglary in the first degree.

An indictment to sustain a conviction for burglary in the first degree must aver every affirmative matter which goes to make out the offense. It must state all such facts and circumstances as constitute the statute offense, so as to

bring the party indicted within the provisions of the statute. *People v. Fellingner*, 24 How. Pr. 341; 15 Abb. 128.

The mode of entry into the house (by forcibly bursting or breaking, etc.) is just as necessary to be averred as that it was in the night-time, or that there was at the time a human being in the house. *Id.*

The indictment charged burglary in the first degree, and the evidence showed burglary in second degree. *Held*, that a conviction of an attempt to commit burglary was erroneous. *Sullivan v. People*, 27 Hun, 85.

If burglary in the first degree is proven, it is not error to refuse to charge the jury that they may convict of a misdemeanor under this section. *People v. Meegan*, 104 N. Y. 529.

The indictment need not specify what kind of crime was intended. *Mason v. People*, 26 N. Y. 200; *People v. Richards*, 5 N. Y. Cr. Rep. 355; 44 Hun, 283.

Where it is shown that defendant broke and entered the house set out in the indictment, the intention with which the breaking and entering were done will be presumed from the act itself. *State v. Teeter*, 8 Crim. Law Mag. 58.

One who breaks and enters a building with intent to steal money from a safe is guilty of burglary, although there is no money in the safe. *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490. See *People v. Moran*, 54 Hun, 279.

Defendants were indicted for breaking and entering with intent to commit larceny. The testimony showed that they broke into a tool-house of a railroad company, took from it a hand-car, put it on the track and rode in it twelve miles, and then removed it to and left it at the side of the track. *Held*, that this did not establish the larcenous intent essential to constitute burglary. *State v. Ryan*, 12 Nev. 401; 28 Am. Rep. 802. See, also, *Com. v. Glover*, 111 Mass. 402; *Walker v. State*, 63 Ala. 50.

Evidence that an article not laid in the indictment as part of the stolen property was taken with the articles specified, and evidence tending to identify it with a similar article seen thereafter in the possession of defendant is admissible as part of the *res gestæ*. *Foster v. People*, 63 N. Y. 619.

It is proper to exhibit the tools with which the crime was committed. *Myers v. People*, 4 Th. & C. 292.

And to prove their names and uses. *Foster v. People*, 63 N. Y. 619; affirming 3 Hun, 6.

§ 497. Burglary in second degree. — A person who, with intent to commit some crime therein, breaks and enters the dwelling-house of another in which there is a human being, under circumstances not amounting to burglary in the first degree is guilty of burglary in the second degree.

§ 498. Burglary in third degree. — A person who either,

1. With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or,
2. Being in any building, commits a crime therein and breaks out of the same;

Is guilty of burglary in the third degree.

Is a felony no matter what may be the age of the convict, or whether he may or may not be punishable therefor in the house of refuge instead of the state prison. *People v. Park*, 41 N. Y. 21; affirming 1 Lans. 263.

A cemetery vault not a "building," etc., within meaning of this section. *People v. Richards*, 108 N. Y. 137; reversing 44 Hun, 283.

It is not necessary to a conviction that an intent to steal or to "commit any felony" shall be shown, provided the intent to commit any crime is averred and established. *People v. Richards*, 5 N. Y. Cr. Rep. 855; reversed on other grounds, 108 N. Y. 137; *People v. Mason*, 26 id. 200.

§ 499. "**Break**" defined. — The word "break," as used in this chapter, means and includes,

1. Breaking or violently detaching any part, internal or external of a building; or,

2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or,

3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or,

4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof.

Opening a street door which is only latched. *People v. Bush*, 3 Park. 552.

Where there are to the cellar-way of a dwelling-house, two doors, one opening outwardly, the other opening into the cellar, the latter is an outer door of the house, and if closed and latched, the unlatching and entering constitutes a breaking and entry. *McCourt v. People*, 64 N. Y. 588.

Where the door of a house is tightly closed without being either bolted, locked or fastened, it is burglary to open it and enter the house with the purpose of stealing. *Frickner v. People*, 6 Hun, 657; *State v. Groning*, 33 Kans. 18.

The removal of a stick of wood and turning a button by which an inner cellar door is fastened, is a sufficient breaking to constitute burglary. *Smith's Case*, 4 City Hall Rec. 62.

One who, intending to steal shelled corn, bores a hole through the floor of a corn-crib from the outside, and thus draws the corn into a sack below, is guilty of burglary. *Walker v. State*, 63 Ala. 49; 35 Am. Rep. 1.

Pushing open a closed or unfastened transom, that swings horizontally on hinges over an outer door of a dwelling-house, and entering thereat, constitutes burglary. *Timmons v. State*, 34 Ohio St. 426; 32 Am. Rep. 376.

The prisoner, pretending to have business with the occupant of a dwelling-house, gained admittance thereto at night, with intent to commit a robbery. *Held*, a constructive breaking sufficient to support an indictment for burglary by breaking and entering. *Johnston v. Com.*, 85 Penn. St. 34; 37 Am. Rep. 622.

In *Nicholls v. State*, 68 Wis. 416; 60 Am. Rep. 870, the defendant with intent to rob an express car secreted himself in a box which he procured to be placed in the car by the agents of the express company. *Held*, a constructive breaking.

To break a house in going out though not in entering is sufficient. *Guck's Case*, 6 City Hall Rec. 12.

Defendant was charged in an indictment with "breaking and entering" a house. The jury were charged that "if they believed the defendant (however he got into the house) broke out of it, he was guilty." *Held*, error. *State v. McPherson*, 70 N. C. 289; 16 Am. Rep. 799.

Defendant entered a house without breaking for the purpose of committing a felony, but broke out in making his escape. *Held*, not burglary at common law, and that the statute of Anne making it burglary was not in force in Pennsylvania. *Roland v. Com.*, 82 Penn. St. 806; 22 Am. Rep. 738.

But *contra* where a person in the night season entered a dwelling-house without breaking, for the purpose of committing a felony, but broke out in making his escape, *held*, to be burglary at common law. *State v. Ward*, 43 Conn. 489; 21 Am. Rep. 665, and note, 669.

One who enters a store through an open door, secretes himself within until the door is locked, then commits a larceny, and escapes by opening or breaking out a window, does not "break into and enter" a store, and cannot be convicted of burglary under the statute. *Brown v. State*, 55 Ala. 123; 28 Am. Rep. 693.

One who secretes himself in a dwelling-house at night, with intent to commit a felony therein, and being discovered, escapes by unlocking or opening a door, is not guilty of burglary. *Adkinson v. State*, 5 Baxt. 509; 60 Am. Rep. 69.

Where a window was left open from a quarter of an inch to an inch, and a person, with intent to steal, effected an entrance to the house by raising the sash higher, *held*, not such a breaking or entering as constitutes burglary. *Com. v. Strupney*, 105 Mass. 588; 7 Am. Rep. 556.

Evidence on the part of the prisoner that the owner of the house was a lewd woman, and that he had had improper intimacy with her, is competent to characterize the breaking. *Robinson v. State*, 53 Md. 151; 36 Am. Rep. 399.

In *Foster v. People*, 3 Hun. 6; affirmed, 63 N. Y. 619, evidence was given that the scuttle to the store was found broken to pieces, and the staple to the lock of the back door forced off. *Held*, sufficient to warrant a finding of a breaking in.

Where two persons acted in concert in planning and executing a burglary and one of them entered the house and brought out the property, while the other waited on the outside, both are guilty of a breaking and entering. *People v. Boujet*, 2 Park. 11.

Evidence that burglar's tools found at the place where the burglary was committed were made for another jointly indicted with the prisoner for the burglary, and shown to be connected with the prisoner in its commission, is admissible to show defendant's guilt. *Clark v. People*, 5 Thomp. & Cook, 33.

§ 500. Repealed, 1892, chapter 677.

§ 501. "Enter" defined. — The word "enter," as used in this chapter, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property.

See 9 Am. and Eng. Encyc. of Law, 669.

Pushing up a trap-door in a floor is sufficient to constitute a burglarious entry. *Harrison v. State*, 20 Tex. App. 387; 54 Am. Rep. 529.

§ 502. "Dwelling-house" defined. — A building, any part of which is usually occupied by a person lodging therein at night, is, for the purposes of this chapter, deemed a dwelling-house.

See 1 Whart. Crim. Law (8th ed.), §§ 781-783, 787; Bish. Stat. Crim. (2d ed.), § 242.

An indictment charged the breaking and entering in the night-time of a "dwelling-house of A. and B., being copartners in business under the firm name and style of A. & B." It was shown on the trial that A. and B. were partners, and in their business used and occupied as stores the lower stories of two adjacent buildings, opening into each other. A., with other persons, lived in the upper rooms, and was there at the time of the burglary, but there was no internal communication between the stores and the upper rooms, the latter being accessible only through a fenced yard and a stair-case leading thence. The breaking was into one of the stores. *Held*, (1) that the ownership was properly charged as being in a partnership; (2) that the entry was into a "dwelling-house" within the statute of burglary, which enacts that no building shall be deemed a dwelling-house, unless joined to, immediately connected with, and part of a dwelling-house; that phraseology being intended only to exclude isolated, uninhabited out-houses. *Quinn v. People*, 71 N. Y. 561; 27 Am. Rep. 87.

A part of a dwelling not communicating with the rest, and used as a store, is not a "dwelling-house," within the definition of burglary. *Jones' Case*, 1 City H. Rec. 183; *Mills' Case*, 3 id. 192; *Smith's Case*, 5 id. 167.

A store under the same roof with a dwelling, and occupied by the same person, is a part of a dwelling-house, within the definition of burglary. *Robertson's Case*, 4 City H. Rec. 63.

A store, communicating with a sleeping-room occupied by a clerk, is a *dwelling-house*. *Woods' Case*, 5 City H. Rec. 10.

In *Rodgers v. People*, 86 N. Y. 360; 40 Am. Rep. 548, it was held, that the chamber of a guest at an inn is not his dwelling-house, but that of the landlord. In that case the indictment charged the defendant with an attempt to burglariously break into and enter the dwelling-house of S., and on the trial it appeared that the attempt was to break into a chamber in a hotel assigned to and occupied by S., as a guest. *Held*, that the indictment was fatally defective.

§ 503. Dwelling-houses, etc.; when deemed separate.— If a building is so constructed as to consist of two or more parts, intended to be occupied by different tenants usually lodging therein at night, each part is deemed the separate dwelling-house of a tenant occupying the same. If a building is so constructed as to consist of two or more parts occupied by different tenants separately for any purpose, each part or apartment is considered a separate building within the meaning of this chapter.

In a tenement-house severed by lease into distinct habitations, each room, or suite of rooms occupied by a tenant, is his dwelling-house, and a door of such room is an outer door so that a breach of it in the day-time is burglary, though the common door, for passage into the street, be open. *Mason v. People*, 26 N. Y. 200.

Opening the inner door of a dwelling-house, at night, with felonious intent, constitutes burglary, whether the felony is to be committed in the particular room or in another. *Rolland v. Com.*, 85 Penn. St. 66; 27 Am. Rep. 626.

The apartment alleged to have been broken and entered is properly laid in the indictment as the dwelling-house of the tenant. *People v. Bush*, 3 Park. 552. See *Smith v. People*, 115 Ill. 17.

When the offense charged consists in an attempt to break into the room of a guest in a hotel, the premises should be described as the dwelling-house of the landlord and not that of the guest. *Rodgers v. People*, 86 N. Y. 360.

§ 504. "Building," defined.— The term "building," as used in this chapter, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure.

Mr. Bishop remarks, that the word "building" in a statute will almost always depend for its meaning in some degree on the particular subject, and its connection with other words. Stat. Crimes, § 292.

The phrase "erection or inclosure" refers to structures of the character used by mankind for the purpose of sheltering or transferring property, or of trade or commercial intercourse. *People v. Richards*, 108 N. Y. 137; 1 Am. St. Rep. 378.

A structure above ground, arranged and intended solely as a place for the permanent interment of the dead, is not "building" within the meaning of this section. *People v. Richards*, 108 N. Y. 137; 1 Am. St. Rep. 378.

In *Barnett v. State*, 38 Ohio St. 7, a defendant was indicted for the burglary of a barn. The proof showed that the building which had been broken and entered was erected by the owner on his farm for a dwelling-house, but had never been occupied or used as such; that the owner had for several years, and ever since its erection, used it to store wheat after it was threshed, and corn after it was husked, such grain being the products of the farm on which the building was erected; and the court held the building a barn within the meaning of the statute.

In *People v. Stickman*, 34 Cal. 242, the defendant was indicted for burglary for breaking and entering a chicken-house in the night-time, with the intent to steal the domestic fowls there being. An objection was taken that to constitute burglary there must be breaking and entering into a house, room or tenement where some person dwells or lives. But the court decided that the language, "any dwelling-house, or any other house whatever, or tent, or vessel or other water craft," was broad enough to include buildings of any kind, and used for any purpose, and sustained the conviction.

In *Orrell v. People*, 94 Ill. 456; 34 Am. Rep. 241, in an indictment for breaking and entering a stable, the objection was taken that it should have been averred that the defendant broke and entered a building. But the court said that the word "stable," as the word was commonly used and understood, was equivalent to "building."

In *Anderson v. State*, 48 Ala. 665; 17 Am. Rep. 86, the building entered was described as "the property of the estate of L.," who was a person deceased before the offense was committed. *Held*, sufficient.

§ 505. Unlawfully entering building.—A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a felony or a larceny, or any malicious mischief, is guilty of a misdemeanor.

In *People v. Meegan*, 104 N. Y. 529, the "breaking," which is the essential element of that crime, was established by uncontradicted evidence. *Held*, that it was not error for the court to refuse to charge the jury that they might convict of misdemeanor, under the provision of this section. *Also, held*, such a refusal to charge was not error, where a modification of the indictment by striking out the characteristics of burglary, would not have left an adequate description of the misdemeanor.

§ 506. Burglar punishable separately for crime in building.—A person who, having entered a building under such

circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary; and may be prosecuted for each crime, separately, or in the same indictment.

Where one is indicted for burglary with intent to commit larceny, and also for the commission of such larceny, if the larceny is defectively charged in the indictment, the prisoner may be convicted of the burglary alone, if that crime is sufficiently proved. *People v. Marks*, 4 Park. 153.

The offense of burglary is complete, by the breaking and entering with the intent to steal, etc. But, although, when it can be proved, the actual larceny is the most conclusive evidence that the intent of the breaking and entering was to steal, it is not the only evidence by which such intent can be proved. Other facts or circumstances or acts or declarations of the prisoner may be shown to prove the intent. *People v. Marks*, 4 Park. 153.

§ 507. **Burglary, how punished.** — Burglary is punishable by imprisonment in a state prison, as follows :

1. Burglary in the first degree, for not less than ten years ;
2. Burglary in the second degree, for a term not exceeding ten years ;
3. Burglary in the third degree, for a term not exceeding five years. [*Amended; in effect May 17, 1892.*]

§ 508. **Possessing burglar's instruments, etc.** — A person who makes or mends, or causes to be made or mended, or has in his possession in the day or night-time, any engine, machine, tool, false-key, pick-lock, bit, nippers or implements adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of a crime, or knowing that the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony.

CHAPTER III.

FORGERY.

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§ 509. Forgery in first degree defined. — A person is guilty of forgery in the first degree who with intent to defraud, forges,

1. A will or codicil of real or personal property, or the attestation thereof, or a deed or other instrument, being or purporting to be the act of another, by which any right or interest in property is or purports to be transferred, conveyed, or in any way charged or affected ; or,

2. A certificate of the acknowledgment or proof of a will, codicil, deed, or other instrument, which by law may be recorded or given in evidence when duly proved or acknowledged, made or purporting to have been made by a court or officer duly authorized to make such a certificate ; or,

3. A certificate, bond, paper writing, or other public security, issued or purporting to have been issued by or under the authority of this state, or of the United States, or of any other state or territory of the United States, or of any foreign government, country or state, or by any officer thereof in his official capacity, by which the payment of money is promised absolutely or upon any contingency, or the receipt of any money or property is acknowledged, or being or purporting to be evidence of any debt or liability, either absolute or contingent, issued or purporting to have been issued by lawful authority ; or,

4. An indorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such a certificate, obligation, public security, evidence of debt or liability, or of any person entitled to such right or interest ; or,

5. A certificate of stock, bond or other writing, bank-note, bill of exchange, draft, check, certificate of deposit, or other obligation or evidence of debt, issued or purporting to be issued by any bank, banking association or body corporate existing under the laws of this state, or of the United States, or of any other state, government or country, declaring or purporting to declare any right, title or interest of any person in any portion of the capital stock, or property of such a body corporate, or promising or purporting to promise or agree to the payment of money, or the performance of any act, duty or obligation; or,

6. An indorsement or other writing, transferring or purporting to transfer the right or interest of any holder of such a certificate, bond, or writing obligatory, or of any person entitled to such right or interest.

Forgery is the fraudulent making or alteration of a writing to the prejudice of another's rights. *United States v. Long*, 30 Fed. Rep. 678; *People v. DeGraaf*, 1 Wheeler C. C. 203.

Forgery is the false making or materially altering with intent to defraud of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. 1 Bish. Crim. Law (7th ed.), § 572.

Forgery is the attempted imitation of another's personal act, and by means of such imitation to cheat and defraud; and not the doing of something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof, who claims and insists by and in the act itself, that he is authorized to obligate the individual whom he is assuming to obligate precisely as he undertakes to do. *Mann v. People*, 15 Hun, 166. This definition is well sustained by authority. 2 Russ. Crim. (9th Am. ed.) 946, 947; *Queen v. White*, 1 Den. Cr. Cas. 208; 2 Cox C. C. 210; 2 C. & K. 404; *Rez v. Story*, Russ. & Ryan, 81; *Rez v. Arcott*, 6 Car. & Payne, 408; 2 Bish. Crim. Law (7th ed.), § 582; 2 Whart. Crim. Law (7th ed.), § 1432; 2 Arch. Crim. Pr. & Pl. (7th ed.) 819; Pomeroy's ed. of Arch., vol. 2, p. 1584; *Conner's Case*, 3 C. H. Rec. 59; *Heilbronner's Case*, 1 Park. 429; *Com. v. Baldwin*, 11 Gray, 197; *State v. Young*, 46 N. H. 266; *State v. McKiernan*, 17 Nev. 238.

Forging any instrument or writing which, as appears on its face, would have been void if genuine, is not an indictable offense. *Fadner v. People*, 2 N. Y. Cr. Rep. 558; 33 Hun, 240; *Cunningham v. People*, 4 id. 457; *People v. Harrison*, 8 Barb. 560; *People v. Shall*, 9 Cow. 778; *People v. Dewey*, 35 Hun, 810; *Abbott v. Rose*, 62 Me. 194. See 2 Bish. Crim. Law (7th ed.), § 583 *et seq.*

If the paper set forth in the indictment and of which the forgery is predicated does not, either upon its face, or by the averment of extrinsic facts, affirmatively appear to be an instrument which, if genuine, would be operative, the indictment is bad, as failing to state facts sufficient to constitute a crime. *People v. Savage*, 5 N. Y. Cr. Rep. 541.

A man may be guilty of forgery by signing his own proper name. *People v. Peacock*, 6 Cow. 72; *U. S. v. Long*, 30 Fed. Rep. 678.

The name of a deceased person is the subject of forgery. *Billings v. State*, 107 Ind. 54; 57 Am. Rep. 77.

So the name of a purely fictitious person. Bish. Crim. Law (7th ed.), § 572, note 6; 1 Wheel. Crim. Cas. 212; *Brown v. People*, 8 Hun, 562; affirmed, 72 N. Y. 571, on other grounds; *State v. Wheeler*, 43 Alb. L. J. 257.

It is enough to allege an intent to defraud persons named. § 718, subd. 5, *post*; *Paige v. People*, 3 Abb. Dec. 439.

The details by which the intent to defraud is to be or may be established may be given in evidence on the trial in support of the averment of fraudulent intent. *Paige v. People*, 3 Abb. Dec. 448; *People v. Stearns*, 21 Wend. 409.; *Com. v. McDonald*, 5 Cush. 365.

Defendant may testify as to his intent to defraud. *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158.

It is competent to prove the guilty knowledge and intent of defendant by showing that he has committed other forgeries, and such evidence can be considered by the jury for that purpose only. *People v. Everhardt*, 104 N. Y. 591; 6 N. Y. Cr. Rep. 232; *People v. De Kroft*, 49 Hun, 71, 76. See, also, 20 Eng. Rep. 389, note.

Evidence that defendant's intemperate habits had so far impaired his mind as to render him incapable of distinguishing between right and wrong is admissible. *People v. Blake*, 65 Cal. 275.

Subdiv. 1. If certain witnesses are necessary to make a will or deed, falsely making a deed or will without such witnesses is not forgery. Whart. Crim. Law (9th ed.), § 697.

Correcting errors in a deed is not forgery. *Bough v. People*, 1 Weekly Dig. 182.

Although averring in an indictment, the forgery of an instrument which contained the words: "I have set my seal," or setting forth a copy with the letters L. S.— is not sufficient averment of a seal, averring the forgery of "a deed" does sufficiently import a seal. *Paige v. People*, 3 Abb. Dec. 439; 6 Park. 683; followed in *People v. Dewey*, 35 Hun, 310, case of a mortgage.

The forgery of a deed to lands lying in another state is indictable here. *People v. Flanders*, 18 Johns. 163; *Barton v. State*, 23 Wis. 587; *State v. Benham*, 7 Conn. 414.

It is necessary to allege in the indictment that the officer whose act it purports to be, was duly authorized to make the certificate. *Vincent v. People*, 5 Park. 88.

The omission to make such allegation is not supplied by setting forth the certificate *in haec verba* if the venue or name of the county is omitted in the certificate, it appearing by the signature that the certificate purported to have been made by a commissioner of deeds. *Vincent v. People*, 5 Park. 88.

Where the authority of the officer depends on locality, it must appear that he acted within the territorial limit prescribed by the statute. *Vincent v. People*, 5 Park. 88.

If this does not appear upon the face of the certificate, its being set forth in the indictment will not supply the omission of a general allegation of authority. *Vincent v. People*, 5 Park. 88.

An indictment will not lie for forging a certificate of acknowledgment of a deed, which certificate does not state that the grantor acknowledged the execution of the conveyance. *People v. Harrison*, 8 Barb. 560.

in his writing

Subdiv. 3. See *People v. Brie*, 48 Hun, 817.

Upon the trial of an indictment for forging the notes of a bank of a state or country, other than New York, the incorporation of the bank need not be proved by direct evidence. *People v. D'Argencour*, 93 N. Y. 624, 628; 2 N. Y. Cr. Rep. 267.

§ 510. Forgery ; false certificate to certain instruments.
An officer authorized to take the proof or acknowledgment of an instrument which by law may be recorded, who willfully certifies falsely that the execution of such an instrument was acknowledged by any party thereto, or that the execution of any such instrument was proved, is guilty of forgery in the first degree.

§ 511. Forgery in second degree. — A person is guilty of forgery in the second degree who, with intent to defraud,

1. Forges the great or privy seal of this state, the seal of any court of record, or of any public office or officer authorized by law, or of any body corporate created by or existing under the laws of this state, or of the United States, or of any other state or any territory of the United States, or of any other state, government or country, or any impression of such a seal ; or any gold or silver coin, whether of the United States or of any foreign state, government or country ; or,

2. Forges a record of a will, conveyance, or instrument of any kind, the record of which is by the law of this state made evidence, or of any judgment, order, or decree of any court or officer, or a certified or authenticated copy thereof ; or,

A judgment roll, judgment, order, or decree of any court or officer, or an enrollment thereof, or a certified or authenticated copy thereof, or any document or writing purporting to be such judgment, order, decree, enrollment, or copy ; or,

An entry made in any book of record or accounts, kept by or in the office of any officer of this state, or of any village, city, town, or county of the state, by which any demand, claim, obligation, or interest, in favor of or against the people of the state, or any city, village, town or county, or any officer thereof, is or purports to be created, increased, diminished, discharged, or in any manner affected ; or an entry made in any book of records or accounts kept by a corporation doing business within the state, or in any account kept by such a corporation, whereby any pecuniary obligation, claim, or credit is or purports to be created, increased, diminished, discharged, or in any manner affected ; or.

An instrument, document, or writing, being or purporting to be, a process or mandate issued by a competent court, magistrate, or officer of the state, or the return of an officer, court or tribunal, to such a process or mandate; or a bond, recognizance, undertaking, pleading, or proceeding, filed or entered in any court of the state, or a certificate, order or allowance by a competent court, or officer, or a license or authority granted pursuant to any statute of the state or a certificate, document, instrument, or writing, made evidence by any law or statute; or,

An instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged, or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased, or diminished, or in any manner affected, the punishment for forging, altering, or counterfeiting which is not hereinbefore prescribed, by which false making, forging, altering, or counterfeiting, any person may be bound, affected or in any way injured in his person or property; or,

3. Makes or engraves a plate in the form or similitude of a promissory note, bill of exchange, bank note, draft, cheque, certificate of deposit, or other evidence of debt, issued by a banker, or by any banking corporation or association, incorporated or carrying on business under the laws of the state, or of the United States, or of any other state or territory of the United States, or of any foreign government, or country, without the authority of such banker, or banking corporation or association; or,

Without like authority, has in his possession or custody such a plate, with intent to use, or permit the same to be used, for the purpose of taking therefrom any impression to be uttered; or,

Without like authority, has in his possession or custody any impression taken from such a plate, with intent to have the same filled up and completed for the purpose of being uttered; or,

Makes or engraves, or causes to be made or engraved, upon any plate, any figures or words, with intent that the same may be used for the purpose of falsely altering any evidence of debt hereinbefore mentioned.

The indictment must allege that the acts were committed with an intent to defraud. *People v. D'Argencour*, 32 Hun, 178; affirmed, 95 N. Y. 624.

Otherwise, if offense charged was committed before Penal Code took effect. Id.

Where the indictment does not contain this allegation, the objection must be taken by a motion in arrest of judgment as prescribed in section 469 of Code of Criminal Procedure, either before or at the time when the defendant is called for judgment. *People v. D'Argencourt*, 32 Hun, 178; affirmed, 95 N. Y. 624.

Subdiv. 1. See *Fadner v. People*, 33 Hun, 240; 2 N. Y. Cr. Rep. 553.

The making of a counterfeit order for the delivery of property, in the name of a third person though the paper be not addressed to any one, is forgery. *Noakes v. People*, 25 N. Y. 380; affirming 5 Park. 291. See, also, *People v. Shaw*, 5 Johns. 236; *People v. Farrington*, 14 id. 348; *Harris v. People*, 9 Barb. 664.

If an insurance agent, intrusted with policies signed in blank, fill out and issue a policy with intent to defraud, after the person insured has been killed, it is forgery. *People v. Graham*, 1 Buff. Super. Ct. 151; 6 Park. 135.

A promissory note made in 1885, and bearing interest at seven per cent, is not necessarily usurious and void and may be the subject of forgery. *People v. Wheeler*, 47 Hun, 484.

A county officer, who without authority has executed in his own name, as the official representative of the county, an instrument purporting in its body to be the contract or obligation of the county, cannot be convicted of forgery. *People v. Mann*, 75 N. Y. 484; 31 Am. Rep. 482; 19 Alb. L. J. 28.

A person authorized to fill out checks signed in blank "for his own purposes, and whenever he needed money," is not guilty of forgery even if he fills up such checks with fraudulent intent and absconds from the county. *People v. Reinitz*, 7 N. Y. Cr. Rep. 71.

To write an instrument fraudulently over the signature of another, which, if true, would be to his prejudice, is forgery. *Martine's Case*, 6 City Hall Rec. 27.

An indictment will lie for the forgery of an obligation for the payment of money although the signature is misspelled. *State v. Covington*, 94 N. C. 913; 55 Am. Rep. 650.

Where a person is indicted for affixing the name of another person to a written instrument without authority, he is entitled to an acquittal if it appear that he had fair grounds for believing that he had such authority, even though in fact he had not. *Parmelee v. People*, 8 Hun, 623; *Montgomery v. State*, 12 Tex. App. 323.

One not the payee of a bill of exchange, but bearing the same name, who indorses and transfers it, knowing that he is not the person intended, is guilty of forgery. *Graves v. American Exchange Bank*, 17 N. Y. 205. See, also, *People v. Peacock*, 6 Cow. 72.

In an indictment for forgery of a check, it is not necessary to set forth indorsements upon the check or a revenue stamp attached. *Miller v. People*, 53 N. Y. 304; 11 Am. Rep. 706.

On the trial of an indictment for forging and uttering a certified bank check, affirmative proof, unobjected to, that the certification is false, is enough to sustain a conviction. *People v. Clements*, 26 N. Y. 194.

An indictment which alleges that defendant falsely made, forged and counterfeited an instrument within the statute, with intent to defraud, setting forth

the instrument *in hæc verba*, is sufficient. *Rosekrans v. People*, 8 Hun, 288; *People v. Dewey*, 35 id. 311.

Upon the trial of an indictment for forgery in the second degree in uttering a check, knowing the same to be forged, it appeared that the defendant, after endeavoring to have the check cashed elsewhere, presented it to a grocer in payment of sixty or seventy cents' worth of provisions, purchased by her, receiving the balance thereof in money, at the same time stating it was a good check. It was drawn for \$13, and purported to be signed by Wm. F. Scott. No person of that name ever had an account at the bank on which it was drawn, and Wm. F. Scott testified that the check was not signed by him, and that there was no other person of that name in New York city to his knowledge. It also appeared that on the same day she passed another small check, under similar circumstances, as to which check there was like evidence that it was a forgery, and that on the day after, she changed her place of residence to a remote part of the city. Upon the trial she testified that the checks had been given her to be cashed by a man with whom she was living, and that she believed them to be good. *Held*, that the evidence as to the forgery of the check was sufficient for the consideration of the jury, and that defendant's knowledge of its character might be inferred from what transpired at the time of passing it, and her conduct afterward, and also from the fact that near the same time she passed another check under similar circumstances, which, probably, was forged. *People v. Elmore*, 8 N. Y. Cr. Rep. 264.

It appeared on defendant's cross-examination that about three weeks previous to the transaction involved, defendant passed another small check which, as she testified, "came back bad." *Held*, a circumstance which the jury might consider as having some bearing on the reliability of her testimony as a witness, and being a transaction similar to the one on which the indictment rested, and near the same time, it so far also tended to prove that she probably was engaged in uttering forged checks of a small denomination. *Id.*

Subdiv. 3. See *People v. D'Argencour*, 32 Hun, 178; affirmed, 95 N. Y. 624.

§ 512. **Qualification of last section.** — A plate, specified in the last section, is in the form and similitude of the genuine instrument imitated, if the finished parts of the engraving thereupon resemble and conform to similar parts of the genuine instruments.

Exact similitude is not required, even in the operative words of the instrument. It is enough that there be resemblance enough to convince the jury that the plate or design was intended to be used in striking off false bills to be used as true ones. *People v. Omer*, 4 Park. 242; *Quinn's Case*, 6 C. H. Rec. 63.

Resemblance must be such as to deceive an ordinary person. 11 Cush, 481; 10 Ind. 372; 7 Pick. 187.

§ 513. **Other cases of forgery in second degree.**— An instrument partly written and partly printed, or wholly printed with a written signature thereto, and any signature or writing

purporting to be a signature of, or intended to bind an individual, a partnership, a corporation or association, or an officer thereof, is a written instrument or a writing, within the provisions of this chapter.

See 4 Park. 166; 3 Gray, 441; 8 Cox Crim. Cas. 82.

§ 514. Other cases of forgery in third degree.— A person who either,

1. Being an officer or in the employment of a corporation, association, partnership or individuals falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association, partnership or individuals; or

2. Who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit, or shall cause, aid, abet, assist or otherwise connive at, or be a party to the making, altering, forging or counterfeiting of any letter, telegram or other written communication, paper or instrument, by which making, altering, forging or counterfeiting, any other person shall be in any manner injured in his good name, standing, position or general reputation; or

3. Who shall alter, or who shall cause, aid, abet, or otherwise connive at, or be a party to the uttering of any letter, telegram, report or other written communication, paper or instrument, purporting to have been written or signed by another person, or any paper purporting to be a copy of any such paper or writing where no original existed, which said letter, telegram, report or other written communication, paper or instrument, or paper purporting to be a copy thereof, as aforesaid, the person uttering the same shall know to be false, forged or counterfeited, and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests or rights of such other person shall be misrepresented or otherwise injuriously affected; or

4. With intent to defraud, shall forge, counterfeit or falsely alter and wrongfully utter any ticket, contract or other paper, or writing entitling, or purporting to entitle, the person whose name appears therein, or the holder or bearer thereof, to entrance upon the grounds or premises of any membership corporation, or being thereupon, to remain upon such grounds or premises; or with like intent, shall use any such ticket, contract or other paper or writing, to effect an entrance or as evidence of his right to remain upon such grounds or premises; or, with like intent, shall sell, exchange or deliver, or keep or offer for sale, exchange or delivery, or receive upon any purchase, exchange or delivery, any such ticket, contract or other paper or writing, knowing the same to have been forged, counterfeited or falsely altered, [*Added 1892; in effect May 18, 1892.*]

Is guilty of forgery in the third degree.

§ 515. Other cases of forgery in third degree.— A person, who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, either,

1. Alters, erases, obliterates, or destroys an account, book of accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership, or individual; or,

2. Makes a false entry in any such account or book of accounts; or,

3. Willfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him or under his direction;

Is guilty of forgery in the third degree.

The words "with intent to defraud" are used as synonymous with the words "with fraudulent intent" or "for a fraudulent purpose" to distinguish the case from one of an erroneous entry made through mistake, or under a misapprehension of a right, or such fictitious entries as are sometimes made for book-keeping purposes, or otherwise innocently. *Phelps v. People*, 72 N. Y. 871.

Subdiv. 2. See *Phelps' Case*, 49 How. Pr. 482; 72 N. Y. 865.

§ 516. **Forging passage tickets.** — A person who, with intent to defraud, forges, counterfeits, or falsely alters any ticket, cheque or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railway or in any vessel or other public conveyance; and a person who, with like intent, sells, exchanges or delivers, or keeps or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, knowing the same to have been forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

A railroad pass may be subject of forgery at common law. *State v. Weaver* 84 N. C. 836; 55 Am. Rep. 647; citing *Com. v. Ray*, 3 Gray, 441; *Reg. v. Boulton*, 3 Carr. & K. 604.

But it is not sufficient simply to allege in the indictment the forgery of a railroad pass, setting it out. The extrinsic circumstances showing the authority of the officer whose name is forged, and the obligation of the company to honor it, must be averred. *State v. Weaver*, 84 N. C. 836; 55 Am. Rep. 647; citing *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560.

§ 517. **Forging United States stamps.** — A person who forges, counterfeits or alters any postage or revenue stamp of the United States, or who sells, or offers, or keeps for sale, as genuine or as forged, any such stamp, knowing it to be forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

§ 518. Officer of corporation selling, etc., shares. — An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States, or of any foreign government, who willfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in this title for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.

§ 519. Falsely indicating person as corporate officer. — The false making or forging of an instrument or writing, purporting to have been issued by or in behalf of a corporation or association, state or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is forgery in the same degree, as if that person were in truth such officer or agent of the corporation or association, state or government.

§ 520. Terms "forge," and "forging." — The expressions "forge," "forged" and "forging," as used in this chapter, include false making, counterfeiting and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several genuine instruments.

In *State v. Stratton*, 27 Iowa, 420; 1 Am. Rep. 233, it was held that the detachment of a written condition, made at the same time and upon the same paper from a promissory note, if altering its character and done fraudulently, is forgery.

§ 521. Uttering, etc., forged instruments, etc., is forgery. A person who, knowing the same to be forged or altered, and

with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent so to utter, offer, dispose of, or put off, either,

1. A forged seal or plate, or any impression of either; or,
2. A forged coin; or,
3. A forged will, deed, certificate, indorsement, record, instrument or writing, or other thing, the false making, forging, or offering of which is punishable as forgery;

Is guilty of forgery in the same degree as if he had forged the same.

See *Watson v. People*, 64 Barb. 180; *Smith v. State*, 20 Neb. 284; 57 Am. Rep. 832; *People v. Camp*, 17 N. Y. Supp. 396.

Greenleaf, in his work on Evidence (vol. 3, § 110), says: "The allegation of uttering and publishing is proved by evidence that the prisoner offered to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was good."

In *People v. Caton*, 25 Mich. 392, Judge Cooley says: "To constitute an uttering, it is not necessary that the forged instrument should have been actually received as genuine by the party upon whom the attempt to defraud is made. To utter a thing is to offer it, whether it be taken or not."

Putting a forged deed on record, or averring it in pleading as a genuine deed, is uttering and publishing it, within the meaning of the statute. *Paige v. People*, 3 Abb. Dec. 439; 6 Park. 688.

In *People v. Martin*, 3 N. Y. Cr. Rep. 122; 36 Hun, 462, defendant was indicted for having in his possession a forged coupon of a railroad bond, with intent to utter, dispose of and put off the same. The forged coupon, which was signed, was attached to a forged bond, sealed, but not signed, found in possession of defendant. Defendant testified that the package containing the bond and coupon had been placed in his care by one S., to be returned to S. on demand. *Held*, that such custody, with intent to return them to S., even with a knowledge that the bond and coupon were forged, did not constitute the offense charged in the indictment.

§ 522. Uttering writing signed with wrong-doer's name.— Whenever the false making or uttering of any instrument or writing is forgery in any degree, a person is guilty of forgery in the same degree, who, with intent to defraud, offers, disposes of, or puts off such an instrument or writing subscribed or indorsed in his own name, or that of any other person, whether such signature be genuine or fictitious, under the pretense that such subscription or indorsement is the act of another person of the same name, or of a person not in existence.

§ 523. **Forgery in first degree, how punished.**—Forgery in the first degree is punishable by imprisonment for a term not exceeding twenty years. [*Amended; in effect May 17, 1892.*]

§ 524. **Forgery in second degree.**—Forgery in the second degree is punishable by imprisonment for a term not exceeding ten years. [*Amended; in effect May 17, 1892.*]

§ 525. **Forgery in third degree.**—Forgery in the third degree is punishable by imprisonment for not more than five years.

§ 526. **Having possession of counterfeit coin.**—A person who has in his possession a counterfeit of any gold or silver coin, whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or to cause the same to be so uttered or passed, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Though a man innocently receive a counterfeit note, if he afterward pass it, knowing it to be spurious, he is guilty. *Gallagher's Case*, 5 C. H. Rec. 1.

Having possession of a counterfeit with intent to sell it is an offense against the statute. *Moses' Case*, 2 C. H. Rec. 84; *Murphy's Case*, 4 id. 42; *Dorsett's Case*, 5 id. 77.

Where more than one counterfeit is found in possession of a person but one prosecution can be sustained thereon. *Lampier's Case*, 5 C. H. Rec. 79.

It is sufficient to convict that the counterfeit coin be so far finished as to be calculated to deceive. *Quinn's Case*, 6 C. H. Rec. 93.

Where party has a die in his possession. *Murphy's Case*, 4 C. H. Rec. 42; *Dorsett's Case*, 5 id. 77.

Party engaged in coining counterfeit money at time of his arrest. *Weaver's Case*, 2 C. H. Rec. 57.

§ 527. **Advertising counterfeit money.**—A person who prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill or any other written or printed matter, advertising, offering or purporting to advertise or offer for sale, loan, exchange, gift, or distribution, or to furnish, procure or distribute any counterfeit coin, paper money, internal revenue stamp, postage stamp or any other token of value, or what purports to be counterfeit coin.

paper money, internal revenue stamp, postage stamp or any other token of value, or giving, or purporting to give, either directly or indirectly, information where, how, of whom or by what means any counterfeit coin, paper money, internal revenue stamp, postage stamp or token of value, can be procured or had, or what purports to be counterfeit coin, paper money, internal revenue stamp, postage stamp or other token of value, can be procured or had, or whoever shall aid, assist or abet in any manner, in any scheme or device whatsoever, offering or purporting to offer, for sale, loan, gift, exchange or distribution, any counterfeit coin, paper money, internal revenue stamp, postage stamp or other token of value, whether called "green articles," "queer coin," "paper goods," "bills," "spurious treasury notes," "United States goods," "green paper goods," "business that is not legitimate," "cigars," "green cigars" or by any other name or title, or any other device of a similar character, shall be guilty of a felony, and on conviction shall be punished by imprisonment for not less than one year nor more than five years, and by a fine of not less than one hundred dollars nor more than one thousand dollars for each offense.

Whoever in and for executing, operating, promoting, carrying on, or in the aiding, assisting or abetting in the promoting, operating, carrying on, or executing of any scheme or device whatsoever to defraud, by use or means of any papers, writings, letters, circulars or written or printed matters concerning the offering for sale, loan, gift, distribution, or exchange, of counterfeit coin, paper money, internal revenue stamps, postage stamps or other token of value as provided in section one of this act, shall use any fictitious, false or assumed name or address, or name or address other than his own right, proper and lawful name; or whoever in the executing, operating, promoting, carrying on, aiding, assisting or abetting in the execution, promotion or carrying on of any scheme or device offering for sale, loan, gift, or distribution, or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom, or by what means any counterfeit coin, paper money, internal revenue stamp, postage stamp, or other token of value, can be obtained or had, or who shall knowingly receive or take from the mails of the United States any letter or package

addressed to any such fictitious, false or assumed name or address or name other than his own right, proper or lawful name shall be guilty of a felony, and on conviction shall be punished by imprisonment for not less than one year, nor more than five years, and by a fine of not less than one hundred dollars nor more than two thousand dollars.

Any letter, circular, writing, or paper, offering or purporting to offer for sale, loan, gift, or distribution, or giving, or purporting to give information, directly or indirectly, where, how, of whom, or by what means any counterfeit coin, paper money, internal revenue stamp, postage stamp, or token of value, may be obtained or had, or concerning any similar scheme or device to defraud the public, whether such article, matter or thing is called "green articles," "queer coins," "paper goods," "queer," "articles," "bills," "business that is not legitimate," "spurious treasury notes," "United States goods," "green paper goods," "green articles," "cigars," "green cigars" or by any other name, device or title of a similar character, shall be deemed presumptive proof of the fraudulent character of such scheme.

This section is intended to include within its ample provisions every device to which resort can be had for the sale or distribution of counterfeit coin or paper money. *People v. Reilly*, 51 Hun, 625.

CHAPTER IV.

LARCENY, INCLUDING EMBEZZLEMENT, OBTAINING PROPERTY BY FALSE PRETENSES, AND FELONIOUS BREACH OF TRUST.

SECTION 528. Larceny defined.

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547. Value of other articles.

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549. Intent to restore property

550. Knowingly receiving.

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§ 528. Larceny defined. — A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either,

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof;

Steals such property, and is guilty of larceny.

For a collection of the definitions of larceny, see 2 Bish. Crim. Law (7th ed.), § 758.

Does the distinction between larceny and obtaining property by false pretenses as it existed prior to the Code still prevail? *Soltau v. Gerdan*, 48 Hun, 543; *Benedict v. Williams*, 15 State Rep. 679.

The distinction was pointed out in *Zink v. People*, 77 N. Y. 114; 33 Am. Rep. 589; 6 Abb. N. C. 427. See 20 Alb. L. J. 156; *People v. Morse*, 99 N. Y. 662; 3 N. Y. Cr. Rep. 321. And adhered to, although with reluctance, and in deference only to earlier cases, and governed the courts of this state until the adoption of the Penal Code. *People v. Dumar*, 106 N. Y. 507.

By the Penal Code, larceny is so treated as to include not only that offense as defined at common law and by the Revised Statutes but also embezzlement, obtaining property by false pretenses and felonious breach of trust. *People v. Dumar*, 106 N. Y. 508; *People v. Ward*, 8 N. Y. Cr. Rep. 504.

But the methods of proof required to establish these respective offenses has not been changed. *People v. Pollock*, 51 Hun, 613; *People v. Sanborn*, 14 State Rep. 129. See *People v. Brien*, 53 Hun, 490.

"The important difference between the former law and the present, so far as this case is concerned, is that the court is no longer called upon to decide whether an offense is larceny, embezzlement or false pretenses; nor is justice liable to be defeated by too nice a discrimination. Each of these acts is larceny. But the general principle of pleading has not been substantially changed. Under either system an offense consists of certain acts done or omitted under certain circumstances; and under neither is any indictment sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true meaning and intent of the statute defining the offense. Under the former, this end was secured by rules formulated and applied by the courts through a long series of decisions; under the latter, it is made imperative by the provisions of the statute." *People v. Dumar*, 106 N. Y. 512. See, also, *People v. Cruger*, 38 Hun, 500; *People v. Sanborn*, 14 State Rep. 129.

To constitute larceny by taking personal property from the possession of the owner it must be done in such circumstances as to constitute a trespass. *People v. Sanborn*, 14 State Rep. 129; *People v. McDonald*, 43 N. Y. 61; *Thorne v. Turck*, 24 id. 95; *Harrison v. People*, 50 id. 518.

Want of consent may be shown by the circumstances of the case. *People v. Wiggins*, 16 Week. Dig. 141.

In *Harrison v. People*, 50 N. Y. 518, the defendant put his hand into the coat pocket of complainant, seized the pocket-book of the latter, containing money and securities and lifted it about three inches from the bottom of the pocket. Held, a sufficient carrying away to constitute larceny.

Removal from the inside of a storehouse to the sidewalk is sufficient asportation. *State v. Mitchener*, 98 N. C. 689.

In *People v. Woodward*, 31 Hun, 57; 2 N. Y. Cr. Rep. 32; 51 Am. Rep. 312, note, it was held that to constitute larceny under the Revised Statutes, there must be an intent on the part of the taker to reap some advantage or benefit from the taking. Learned, P. J., in his dissenting opinion, gives an exhaustive review of the authorities, and concludes that the *lucri causa* is not an essential element of the crime. See 29 Alb. L. J. 239, 299; 2 Bish. Crim. Law (7th ed.), §§ 758, 847.

"It is enough * * * if the owner has been deprived of a valuable thing whether the thief can legally obtain any benefit from its possession or not. If he feloniously deprives the owner of it, the offense is complete." Westbrook, J., in *Phelps' Case*, 49 How. Pr. 440. See *Delk v. State*, 60 Am. Rep. 46; *Wilson v. State*, 51 id. 309; *State v. Davis*, 38 N. J. Law, 176; 20 Am. Rep. 367; *People v. Jaurez*, 28 Cal. 380.

To constitute the offense of larceny under this section, there must be an evidence of a criminal intent to deprive or defraud the owner of his property.

People v. Pollock, 51 Hun, 613; *McCourt v. People*, 64 N. Y. 583; *People v. Grimm*, 3 N. Y. Cr. Rep. 317; *People v. Church*, id. 57; *Abrams v. People*, 6 Hun, 492.

"Felonious intent," where used in penal statutes, means criminal intent, and criminal intent is an intent to deprive or defraud the true owner of his property. *People v. Moore*, 37 Hun, 93-94; 3 N. Y. Cr. Rep. 458.

In his *Pleading and Evidence* (3d Am. ed.) 173, Archbold thus defines the "felonious intent:" "But larceny, as far as respects the intent with which it is committed, * * * may perhaps be correctly defined thus: Where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use." See, also, 2 Bish. Crim. Law (7th ed.), § 840.

The removal of property under advice and without "*animo furandi*" does not constitute larceny; where the value is less than \$25 it is at most a misdemeanor and no indictment will lie. *People v. Burton*, 16 Week. Dig. 195.

Taking a bird cage of trifling value from a neighbor's yard through mischief merely is not larceny. *Crocheron's Case*, 1 C. H. Rec. 177.

The felonious intent must exist at the time of taking or obtaining possession of the property. *People v. Moore*, 37 Hun, 94; *Smith v. People*, 53 N. Y. 114; *Wilson v. People*, 39 id. 459; *Abrams v. People*, 6 Hun, 491; *People v. Jersey*, 18 Cal. 337; *Cunningham v. State*, 27 Tex. App. 479.

Where, however, the offense consists in the secreting, withholding or appropriating, or where it consists in the appropriating of property by bailee, servant, attorney, agent, clerk, etc., it is only necessary that the felonious intent exists at the time of such secreting, withholding or appropriating of the property, for in such cases the property stolen would be properly in the possession of the party secreting, withholding or appropriating it. *People v. Moore*, 37 Hun, 94; *People v. Civile*, 44 id. 499.

If personal property be left through inadvertence in the possession of another, and he conceal it *animo furandi*, it is larceny. *People v. McGarren*, 17 Wend. 460. But see *Reg. v. Flowers*, 16 Cox Crim. Cas. 33; 37 Eng. Rep. 797.

The jury must find such criminal intent as a fact upon the evidence before a conviction can be had. *People v. Pollock*, 51 Hun, 613; *Ellis v. People*, 21 How. Pr. 359; *People v. McDonald*, 43 N. Y. 61; *Wilson v. State*, 18 Tex. App. 270; 51 Am. Rep. 311; *State v. Powell*, 4 L. R. A. 291. See, also, 4 Blackstone Com. 232; 3 Chitty Crim. Law, 927; 1 Hale P. C. 507; 2 East P. C. 661, 662; 2 Arch. Crim. Pr. & Pl. (8th ed.) 1184.

It is competent upon the question of intent, to show and permit the jury to know all the surrounding circumstances of the case. *People v. Pollock*, 51 Hun, 615.

Defendant has a right to testify to facts which show that he had no criminal intent. *People v. Moore*, 3 N. Y. Cr. Rep. 459.

Evidence of similar larcenies on the part of the prisoner is competent. *Shipply v. People*, 86 N. Y. 375; 40 Am. Rep. 551; *People v. Reavey*, 4 N. Y. Cr. Rep. 1. See, also, *People v. Dimick*, 107 N. Y. 32.

But only when so connected as to time and so similar in their other relations that the same motive might reasonably be imputed to all. *People v. Keepers*, 13 State Rep. 357.

The question whether the possession of stolen property by a person accused of the larceny establishes his guilt is one of fact for the jury. *People v. McCallam*, 103 N. Y. 588; *Knickerbocker v. People*, 43 id. 177; *Goldstein v. People*, 82 id. 235; *Malachi v. State* (Ala.), 42 Alb. L. J. 381.

It is error to refuse to charge the jury that there can be no larceny without a felonious intent. *People v. Moore*, 37 Hun, 98; *People v. Pollock*, 51 id. 613.

If the court in defining larceny omit the word "felonious" it will be error. *People v. Cheong Foon Ark*, 61 Cal. 527.

As to larceny by trick, see *Smith v. People*, 53 N. Y. 111; Bk. XI (Parsons' ed.), 420, and exhaustive note; 13 Am. Rep. 474; *Loomis v. People*, 67 N. Y. 322; 23 Am. Rep. 123; *Defrese v. State*, 3 Heisk. 53; 8 Am. Rep. 1; *People v. Tweed*, 1 N. Y. Cr. Rep. 97; *Weyman v. People*, 4 Hun, 511; 62 N. Y. 623; *Macino v. People*, 12 Hun, 127. See, also, 46 Am. Rep. 183; 10 Crim. Law Mag. 560; *Reg. v. Hollis*, 15 Cox Crim. Cas. 345; 36 Eng. Rep. 566; *People v. Ras*, 66 Cal. 423; 60 Am. Rep. 102.

One W. deposited with defendant \$600 as security for the faithful performance of the duties of one H., whom defendant had agreed to employ, defendant agreeing to return said money on a termination of the contract of hiring, and to pay interest. Defendant failed to employ H. and did not return the money. *Held*, that she was properly convicted of grand larceny. *People v. Morse*, 99 N. Y. 662; 3 N. Y. Cr. Rep. 104, 321.

On the trial of an indictment for larceny, it appeared that the prisoner, H., who was a saloon-keeper, received from R. a \$20 gold piece out of which to take pay for twenty-five cents' worth of liquor; not being able to make change, H. was requested by R. to go out and get the change; he went out and lost the money gambling. *Held*, that H. was properly convicted of the crime charged. *Justices, etc., v. People, ex rel. Henderson*, 90 N. Y. 12; 43 Am. Rep. 135; 1 N. Y. Cr. Rep. 83. See, also, *Murphy v. People*, 104 Ill. 528; 27 Alb. L. J. 164; *Reg. v. Aden*, 6 Eng. Rep. 337; *Reg. v. Loukinson*, 31 id. 730.

This section covers a case of an appropriation by the chamberlain of a city, to his own use, of public moneys in his hands, and the indictment therefor need not be found under section 470 of this Code, or the provisions of a city charter. *People v. Church*, 3 N. Y. Cr. Rep. 57.

The obtaining by an attorney of money or property by false or fraudulent representations is not governed by section 148 of the Penal Code, but is larceny under this section. *People v. Reavey*, 4 N. Y. Cr. Rep. 1; 38 Hun, 418; 89 id. 364.

There can be no larceny where the evidence fails to show that any reliance was placed on the false representations made, or that any credit was given to defendant therefor. *People v. Bough*, 16 State Rep. 18.

Where it appears that defendant induced another person to procure certain goods on forged orders, both are guilty, as principals, of larceny. *People v. Brien*, 7 N. Y. Cr. Rep. 166; 53 Hun, 496; *People v. Sheahan*, 1 Wheel. Crim. Cas. 226.

It is larceny for a wife's paramour to carry off the husband's goods through the solicitation of the wife. *People v. Schuyler*, 6 Cow. 572; *People v. Cole*, 43 N. Y. 508; *Reg. v. Flatman*, 21 Alb. L. J. 404, 418. See *Queen v. Kenny*, 20 Eng. Rep. 366.

The following have been held to be subjects of larceny:

Ice stored for domestic use; *Ward v. People*, 3 Hill, 395; an "accountable receipt;" *People v. Bradley*, 4 Park. 245; a note payable in specific articles; *People v. Bradley*, 4 Park. 245; a dog; *Mullaly v. People*, 86 N. Y. 365, 369; *State v. Yates*, 37 Alb. L. J. 232; *State v. Harriman*, 75 Me. 562; 46 Am. Rep. 423; *State v. Brown*, 9 Baxt. 53; 40 Am. Rep. 81; *State v. Doe*, 79 Ind. 9; 41 Am. Rep. 599; *Mayor v. Meigs*, 1 McArthur, 53; 29 Am. Rep. 578; *Com. v. Hazlewood*, 84 Ky. 681. See 23 Alb. L. J. 444. *Contra*, *Ward v. State*, 48 Ala. 161; 17 Am. Rep. 31; *State v. Lyman*, 26 Ohio St. 400; 20 Am. Rep. 772; the certification of a check; *People v. Ward*, 3 N. Y. Cr. Rep. 483; certificates of stock; *People v. Griffin*, 38 How. Pr. 475; drafts sent to state comptroller though not indorsed by the latter; *Phelps v. People*, 72 N. Y. 334.

The following not: A lottery ticket; *Healy's Case*, 4 City Hall Rec. 36; a simple receipt; *People v. Bradley*, 4 Park. 245; *People v. Loomis*, 4 Den. 380; an undelivered satisfaction piece of a mortgage; *People v. Stevens*, 38 Hun, 65; bill or notes not payable in money; *Linnenden's Case*, 1 City Hall Rec. 30.

In *People v. Cruger*, 102 N. Y. 510, the owner of a diamond pin intrusted it to another, to procure a loan thereon, which he did. *Held*, that his omission to account for or appropriation of the proceeds of the loan would not sustain an indictment against him for the larceny of the ring.

In order to make out the crime of obtaining property by false pretenses, it is necessary to prove the false pretenses; that in reliance thereon and under the indictment thereof the property was parted with, and also that the false pretenses were made with intent to cheat and defraud. *People v. Baker*, 96 N. Y. 340. See 7 Alb. L. J. 135.

Mere silence or suppression of the truth, a mere withholding of knowledge upon which another may act, is not sufficient to constitute false pretense. *People v. Baker*, 96 N. Y. 340.

In *People v. Blanchard*, 90 N. Y. 319, it was held an indictment for false pretenses may not be founded upon an assertion of an existing intention, although it did not in fact exist; there must be a false representation as to an existing fact. The court say: "We have found no case which holds that an indictment for false pretenses can be founded upon an assertion of an existing intention although it did not in fact exist. Pollock, C. B., in *Archer's Case*, Dearsley C. C. 453, describes the present case very nearly in his statement that 'if a man says: 'I want goods for a certain house and I mean to send them to that house; sell them to me,' that would not be a representation of an existing fact;' other authorities lead to the same conclusion. 2 Whart., § 2118; *West's Case*, 1 D. & B. 575; *Ranney v. People*, 22 N. Y. 417; *Reg. v. Bates*, 3 Cox Crim. Cas. 201; *Reg. v. Jennison*, id. 158; *Reg. v. Goodhall*, Russ. & Ryan, 461; *People v. Tompkins*, 1 Park. 238." See, also, *Therasson v. People*, 20 Hun, 60, note.

The indictment must show what the false pretenses were, and state them with reasonable certainty and precision. *People v. Blanchard*, 90 N. Y. 319; *People v. Oyer & Terminer*, 83 id. 449.

It is not necessary that the prosecution should prove them all. *People v. Blanchard*, 90 N. Y. 319; *Webster v. People*, 92 id. 427; *Butler v. Maynard*, 11 Wend. 552; *Bielschofsky v. People*, 3 Hun, 40.

Where representations set forth in the indictment are proved, the sense in which they were used and what was designated to be and was understood from them are questions for the jury. *People v. Blanchard*, 90 N. Y. 819; *Reg. v. Archer*, 6 Cox Crim. Cas. 518.

The question whether the false pretense was calculated to deceive and was capable of defrauding is for the jury. *People v. Oyer & Terminer*, 83 N. Y. 449. See, also, *Watson v. People*, 87 id. 565; *Reff v. People*, 2 Park. 189; *Thomas v. People*, 84 N. Y. 852; *Foots v. People*, 17 Hun, 219.

Not necessary that indictment should be drawn with reference to one or the other of the special classes of larceny as defined by above section. *People v. Dunn*, 7 N. Y. Cr. Rep. 173; 53 Hun, 381.

The indictment is sufficient if it charges the crime and gives a concise statement plain enough to apprise the defendant of the charge made against him. *People v. Dunn*, 7 N. Y. Cr. Rep. 173; 53 Hun, 381.

The indictment may charge in separate counts the larceny as committed by different means. *People v. Dimick*, 107 N. Y. 14.

Where the indictment has but one count charging one of the acts constituting the crime, it cannot be sustained by proof that the crime was committed by different means. *People v. Dumar*, 106 N. Y. 502; *People v. Bough*, 16 State Rep. 18. All that was decided in the *Dumar Case* was that the act stated differed from the one proved. *People v. Dunn*, 7 N. Y. Cr. Rep. 185. In the *Dumar Case*, "The crime charged was a totally different one from that which the facts proved, although both were grand larceny." *People v. Bliven*, 112 N. Y. 87.

The indictment should charge the specific act or acts alleged to have been committed, which constitute the offense. *People v. Sanborn*, 14 State Rep. 129; *People v. Dunn*, 53 Hun, 381.

An allegation that defendant "did feloniously steal, take and carry away" certain property, which was specifically described, and its value stated at a sum which was more than \$25, and its ownership was also stated; *held*, a sufficient averment of the crime of grand larceny. *People v. Willett*, 102 N. Y. 251.

An indictment charging that defendant and another "did steal, take and carry away" certain property is supported by evidence that the defendant counseled, aided and procured that other defendant to steal certain property of his employer in his custody as clerk. In such case there is no variance between the indictment and the proof. *People v. Dunn*, 7 N. Y. Cr. Rep. 173; 53 Hun, 384.

As to sufficiency of description of stolen property see *People v. Dunn*, 7 N. Y. Cr. Rep. 173; 53 Hun, 381; *People v. Alitta*, 28 Weekly Dig. 326.

An amendment in the indictment of the name of the corporation from whom property was stolen, which merely corrects a misnomer, is not error. *People v. Dunn*, 7 N. Y. Cr. Rep. 173; 53 Hun, 381; *People v. Herman*, 45 Hun, 175.

§ 529. Obtaining money or property by fraudulent draft. — A person who willfully, with intent to defraud, by color or aid of a cheque or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee

for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same and punishable accordingly.

There must be a willful intent to defraud. *People v. Cuykendall*, 3 N. Y. Cr. Rep. 812.

Defendant paid a debt by a post-dated check, stating that he did not want it presented till the day of its date, as he had bought certain property; that, therefore, he was a little short, and that he had paper out on which he expected to get some money. *Held*, not larceny under this section. *People v. Cuykendall*, 3 N. Y. Cr. Rep. 812.

A false pretense that the prisoner had procured a bill of exchange for the prosecutor which is ready for delivery, is indictable. *Decosta's Case*, 1 City Hall Rec. 83; *Allen's Case*, 3 id. 118.

A check drawn on a bank where prisoner has no funds under a representation that there were funds to meet it, is indictable. *People v. Smith*, 47 N. Y. 303; *Lesser v. People*, 12 Hun, 670; 73 N. Y. 78; *Footo v. People*, 17 Hun, 218; *Rex v. Jackson*, 3 Camp. 370; *Rex v. Parker*, 7 Car. & P. 825.

§ 530. **Grand larceny in first degree.** — A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this chapter,

1. Property of any value, by taking the same from the person of another in the night-time; or,

2. Property of the value of more than twenty-five dollars, by taking the same in the night-time from any dwelling-house, vessel, or railway car; or,

3. Property of the value of more than five hundred dollars, in any manner whatever.

On an indictment for grand larceny there may be a conviction for petit larceny. *People v. McTameney*, 13 Abb. N. C. 56; 66 How. Pr. 73.

The prisoner is entitled to have the jury instructed whether the offense proved, amounts to more than petit larceny. *Williams v. People*, 24 N. Y. 405; *Rhodiban v. People*, 5 Park. 395; *Higgins v. People*, 7 Lans. 110.

Where the value of a thing is necessary to fix the grade of the offense, it is a proper mode of stating it to aver that the thing is of or more than the value prescribed by the statute. *Phelps v. People*, 72 N. Y. 334.

But the elements which make up the value need not be averred. *Id.*

Evidence that stolen gold certificates were received and used in the ordinary course of business as money is sufficient proof of their value. *People v. Dunn*, 7 N. Y. Cr. Rep. 174; 53 Hun, 384.

Proof of the statutes and resolutions under which city bonds were issued is allowable with a view of establishing their validity and value in a trial for their conversion. *Bork v. People*, 31 Hun, 360; 1 N. Y. Cr. Rep. 368; 91 N. Y. Cr. Rep. 379.

§ 531. **In second degree.** — A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this chapter, steals or unlawfully obtains or appropriates,

1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever ; or,

2. Property of any value, by taking the same from the person of another ; or,

3. A record of a court or officer, or a writing, instrument or record kept, filed or deposited according to law, with, or in keeping of any public office or officer.

See *People v. McTamoney*, 13 Abb. N. C. 56; 65 How. 401; 1 N. Y. Cr. Rep. 437; *People v. Reavey*, 38 Hun, 418; 4 N. Y. Cr. Rep. 1; 39 Hun, 364.

Larceny from person may be shown by the circumstances attending the taking without producing the person from whom the property was taken to show that the taking was without consent. *People v. Wiggins*, 38 Hun, 418; 4 N. Y. Cr. Rep. 1; 92 N. Y. 656.

Defendant, a clerk, having made at different times collections for his employers, amounting to \$667.18, but of which no one sum collected exceeded \$25, came within the county of Erie, and with an amount of said moneys exceeding \$25 in his possession, and absconded therewith from Erie county. *Held*, that the defendant committed the offense of grand larceny in the second degree in the county of Erie. *People v. Carr*, 3 N. Y. Cr. Rep. 578.

In *People v. McCallam*, 108 N. Y. 587, defendant was charged with stealing property of the value of \$500. The owner testified that he lost that amount of money; from his cross-examination it was claimed that he was uncertain as to the amount taken. The court charged that if the jury were convinced that the value of the property taken was over \$500, and that defendant took it, they might convict her of grand larceny in the first degree; if the value was less, but more than \$25, they might convict of grand larceny in the second degree; if less than \$25, then of petit larceny. *Held*, no error, and that a conviction of grand larceny, second degree, was proper.

§ 532. **Petit larceny.** — Every other larceny is petit larceny.

That the stolen property had some intrinsic value justifies a conviction of petit larceny. *People v. White*, 1 N. Y. Cr. Rep. 466.

Keeping \$20, in payment of a debt of twenty-five cents, is petit larceny. *Justices, etc.*, v. *People*, 90 N. Y. 12.

There may be a conviction of petit larceny upon the trial of an indictment for grand larceny. *People v. McTamoney*, 13 Abb. N. C. 56; 66 How. 73.

§ 533. **Grand larceny in first degree, how punished.** — Grand larceny in the first degree is punishable by imprisonment for a term not exceeding ten years. [*Amended ; in effect May 17, 1892.*]

§ 534. **Grand larceny in second degree.**—Grand larceny in the second degree is punishable by imprisonment for a term not exceeding five years. [*Amended ; in effect May 17, 1892.*]

§ 535. **Petit larceny a misdemeanor.**—Petit larceny is a misdemeanor.

In *People v. Finn* (Jan., 1882), 87 N. Y. 584, the court say: "The offense has long since ceased to have any of the incidents or ear-marks of a felony, and it would lead to much confusion and practical inconvenience now to hold that it is a felony not triable in courts whose jurisdiction is confined to trials of misdemeanors."

Punishable under section 15, Penal Code, by imprisonment in penitentiary or county jail for not more than one year, or by a fine of not more than \$500, or both. *People v. McTameney*, 66 How. 70; 13 Abb. N. C. 55; *Matter of Hallenbeck*, 65 How. 401; 30 Hun. 505; 1 N. Y. Cr. Rep. 437.

§ 536. **Completed unissued instruments property.**—All the provisions of this chapter apply to cases where the property taken is an instrument for the payment of money, an evidence of debt, a public security, or a passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner.

This provision does not embrace instruments intended to be used as a release of a debt or a discharge of a mortgage lien. *People v. Stevens*, 38 Hun. 65.

Bank bills complete in form though unissued are the subject of larceny. *People v. Wiley*, 3 Hill, 194; unindorsed drafts; *People v. Phelps*, 49 How. 437; 72 N. Y. 334; notes on foreign bank; *People v. Jackson*, 8 Barb. 637; certification of a check; *People v. Ward*, 3 N. Y. Cr. Rep. 483.

§ 537. **Severance of fixture, etc., larceny.**—All the provisions of this chapter apply to cases where the thing taken is a fixture or part of the realty, or any growing tree, plant, or produce, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at a previous time.

See § 640, subd. 3, *post*.

§ 538. **Keeping wrecked goods, a misdemeanor.**—A person who takes away goods or other property not his own from a stranded vessel, or any goods or other property cast by the sea upon the land, or found in a bay or creek, or who knowingly

becomes possessed of any such goods or other property, and does not deliver the same within forty-eight hours thereafter, to the sheriff or one of the coroners or wreck masters of the county where the same was found, is guilty of a misdemeanor.

See 2 Bish. Crim. Law (7th ed.), § 876, note.

The felonious appropriation of property which has been swept from the deck of a vessel in a gale, is larceny. *Dayton's Case*, 2 City Hall Rec. 167.

§ 539. **Lost property.** — A person who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny.

See 2 Bish. Crim. Law (7th ed.), § 759, note 17; *Tracy v. Seamans*, 7 State Rep. 146.

To constitute larceny of lost property the finder must have had a larcenous intent at the moment of finding. *Reed v. State*, 8 Tex. App. 40; 34 Am. Rep. 732.

A *bona fide* finder of a lost article is not guilty of larceny by any subsequent appropriation of it. *People v. Anderson*, 14 Johns. 294; *Bailey v. State*, 52 Ind. 462; 21 Am. Rep. 182, 187.

To render the finder of lost property guilty of larceny he must know the owner, or have the means of identifying him instantaneously at the time of the finding. *People v. Cogdell*, 1 Hill, 94.

A finder of goods who knows the owner, or has reason to believe who is the owner, and fraudulently converts the same to his own use, is guilty of larceny. *People v. Swan*, 1 Park. 9; *People v. Katz*, 3 id. 129; *Com. v. Titus*, 116 Mass. 42; 17 Am. Rep. 138, 140, note.

§ 540. **Bringing stolen goods into state, larceny.** — A person, who having, at any place without the state, stolen the property of another, or received such property, knowing it to have been stolen, brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed within the state. Complaint may be made and the indictment found and tried, and the offense may be charged to have been committed, in any county into or through which the stolen property is brought.

A statute providing that one who should bring into the state property stolen in another state shall be guilty of larceny is constitutional. *People v. Williams*, 24 Mich. 156; 9 Am. Rep. 119.

A foreigner committing a larceny abroad, coming into this state and bringing the stolen property with him, may be indicted, convicted and punished in

the same manner as if the larceny had been committed here. *People v. Burke* 11 Wend. 129. See *contra*, *People v. Gardner*, 2 Johns. 477; *State v. Newman*, 9 Nev. 48; 16 Am. Rep. 8.

In the case of larceny or burglary a person may be convicted in any county in this state where he carries the stolen property. *Haskins v. People*, 16 N. Y. 344.

The bringing into Ohio, by the thief, of goods stolen in the dominion of Canada, or other foreign country, is not larceny in Ohio. *Stanley v. State*, 24 Ohio St. 166; 15 Am. Rep. 604.

§ 541. Conversion by trustee, larceny; how punished.—A person acting as executor, administrator, committee, guardian, receiver, collector or trustee of any description, appointed by a deed, will, or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or of property, or other valuable thing, or any proceeds thereof, in his possession or custody by virtue of his office, employment or appointment, is guilty of grand or petty larceny in such degree as is herein prescribed, with reference to the amount of such property; and upon conviction, in addition to the punishment in this chapter prescribed for such larceny, may be adjudged to pay a fine, not exceeding the value of the property so misappropriated or stolen, with interest thereon from the time of the misappropriation, withholding or concealment, and twenty per centum thereupon in addition, and to be imprisoned for not more than five years in addition to the term of his sentence for larceny, according to this chapter, unless the fine is sooner paid.

See *Bartow v. People*, 18 Hun, 22; *Matter of Bushnell*, 17 State Rep. 827.

§ 542. Disposition of fine.—So much of the fine authorized in the last section to be imposed, as does not exceed the amount or value of the property taken, appropriated or stolen, with interest thereupon from the time of the commission of the offense, and a reasonable sum to defray the expenses of collecting the same, to be fixed by the supreme court, must, when received or collected, be paid to the county treasurer of the county where the conviction was had, for the benefit of the person injured or defrauded, or whose property the offender took, misappropriated or concealed, or his representative or assignee; and must be paid

over to him by the county treasurer, upon the order of the supreme court, made after notice to the district attorney of the county.

§ 543. **Remission of fine.** — In case of payment of the value of the property stolen or taken, with interest, by the person convicted, or of the collection of the same by civil action, the court may, in its discretion, upon application by such person, and such notice to other persons interested, and to the district attorney of the county, as the court may direct, remit the fine imposed, pursuant to the last section, except the additional allowance for expenses.

§ 544. **Verbal false pretense not larceny.** — A purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged.

See *Watson v. People*, 87 N. Y. 561.

Whether the deposit of a draft with a banker is a "purchase of property" not decided. *People v. Moore*, 3 N. Y. Cr. Rep. 468; 37 Hun, 93.

False representations as to the ability to pay of a third person are not within this section, and need not be in writing. *People v. Dumar*, 5 N. Y. Cr. Rep. 55; 42 Hun, 86.

§ 545. **Value of evidence of debt, how ascertained.** — If the thing stolen consists of a written instrument, being an evidence of debt, other than a public or corporate certificate, scrip, bond, or security having a market value, or being the transfer of or evidence of title to any property, or of the creating, releasing or discharging of any demand, right or obligation, the amount of money due thereupon or secured to be paid thereby, and remaining unsatisfied, or which, in any contingency, might be collected thereupon or thereby, or the value of the property transferred or affected, or the title to which is shown thereby, or the sum which might be recovered for the want thereof, as the case may be, is deemed the value of the thing stolen.

§ 546. **Value of passenger ticket.** — If the thing stolen is a ticket, paper or other writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon a railway car, vessel, or other public conveyance, the price at which a ticket,

entitling a person to a like passage, is usually sold, is deemed the value thereof.

§ 547. **Value of other articles.**— In every case not otherwise regulated by statute, the market value of the thing stolen is deemed its value.

See Abbott's Trial Ev. 307.

§ 548. **Claim of title, ground of defense.**— Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him.

See 28 Eng. Rep. 580; Moak's Underhill Torts, 169, 170, 228.

A false representation through which one obtains payment of a just debt is not within the statute. *People v. Thomas*, 3 Hill, 169.

But it is no defense that the prosecutor was indebted to the prisoner in a sum equal to the amount obtained, and it was the prisoner's intention to apply the money to the payment of such debt. *People v. Smith*, 5 Park. 490.

Complainant sold temperance drinks in bottles, to which he retained title, and which, when emptied, were to be returned to him. Defendant was in the habit of obtaining such bottles and returning them to complainant when the latter called for them, on payment of two or three cents a piece. After being notified by complainant to cease such traffic, defendant obtained more bottles, and refused to deliver them to complainant unless paid as before. Defendant openly admitted his possession of the property, and asserted his right to hold it. *Held*, that there was not sufficient criminal intent to constitute larceny. *People v. Grimm*, 3 N. Y. Cr. Rep. 317.

Defendant sought to show that he had obtained the bottles, charged to have been stolen, from customers to whom claimant had disposed of them. *Held*, that the exclusion of such evidence was error. *People v. Grimm*, 3 N. Y. Cr. Rep. 317.

Taking property under a fair claim of right is not larceny, and the publicity of the taking is very powerful evidence of the good faith of the claim. *Cansey v. State*, 79 Ga. 564; 11 Am. St. Rep. 447.

As to claim of right, see 1 Hale P. C. 509; 2 Russ. Crimes, 163; 2 Archb. Crim. Pl. & Pr. 1183; 1 Whart. Crim. Law, § 884; 1 Bish. Crim. Law, § 884; *id.*, § 297; *id.*, § 851; *Graves v. State*, 25 Tex. App. 333; *Meade v. State*, 25 Neb. 444.

As to open taking, see 1 Hale P. C. 509; 2 Russ. Crimes, 158; 2 East P. C. 661; 2 Bish. Crim. Law, § 842, note 1; 2 Archb. Crim. Pl. & Pr. 1183, note 1.

§ 549. **Intent to restore property.**— The fact that the defendant intended to restore the property stolen or embezzled is

no ground of defense, or of mitigation of punishment, if it has not been restored before complaint to a magistrate, charging the commission of the crime.

§ 550. **Knowingly receiving.** — A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation had been committed within the state, whether such property were so stolen or misappropriated within or without the state, is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

Larceny and receiving stolen goods are separate, distinct and independent offenses requiring different kinds of proof. *People v. Brien*, 53 Hun, 490; *Gaither v. State*, 8 Crim. L. Mag. 754.

One who negotiates for the restoration of stolen property in consideration of receiving a percentage himself, may be convicted of the offense of receiving stolen property. *People v. Wiley*, 3 Hill, 194; *Wells v. People*, 3 Park. 473.

Where several are shown to have confederated in the receiving of stolen goods, all may be convicted, though all were not actually present at the receiving. *People v. Stein*, 1 Park. 202.

If jointly indicted, two persons may be convicted, though each received in the absence of the other. *Chatterton v. People*, 15 Abb. 147.

A married woman may be convicted jointly with her husband for receiving stolen goods, when she participates actively in the crime or in secreting them in the absence of her husband. *Goldstein v. People*, 23 Alb. L. J. 415; 82 N. Y. 231.

Before one can be convicted of having feloniously received goods which had been stolen from an incorporated company, the indictment must allege, and it must be proved on the trial, that the company alleged to have been injured by the offense was an existing corporation. *Cohen v. People*, 5 Park. 330.

The indictment need not allege in terms that the property was received by the accused feloniously or with criminal intent. *People v. Weldon*, 111 N. Y. 569; overruling *People v. Johnson*, 1 Park. 564.

An allegation in an indictment that defendant criminally received the property is the equivalent of feloniously, and constitutes a sufficient averment of

criminal intent. *People v. Weldon*, 111 N. Y. 569. Need not state the place of the larceny. *Com. v. Sullivan*, 136 Mass. 170. Not necessary to aver that any consideration passed between the thief and the receiver. *Hopkins v. People*, 12 Wend. 76. Not necessary that the jury should find that the goods were stolen by the person named as the thief in the indictment. *People v. Caswell*, 21 Wend. 86.

The prosecution proved the finding at the house of the prisoner other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected. *Held*, that if the proof given by the prosecution was competent, such testimony was erroneously rejected; that the prisoner had the right to meet the evidence against him by testimony tending to show that he came by the property honestly. *People v. Dowling*, 84 N. Y. 479.

The mere finding of a stolen article in possession of another not enough; guilty knowledge must be shown. *Shotwell's Case*, 3 C. H. Rec. 95.

In *People v. Dowling*, 84 N. Y. 479, some of the stolen property was found in the prisoner's possession; he claimed that he purchased it, and offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase, by the men of whom the alleged purchase was made. This was objected to and excluded. *Held*, error; that while not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the question of guilty knowledge. Overruling *Wills v. People*, 3 Park. 473; *People v. Rando*, id. 335.

Evidence that the accused has frequently received similar articles of property, under like circumstances, from the same thief, stolen from the same person or place, knowing that they were stolen, is proper upon the question of guilty knowledge. *Copperman v. People*, 56 N. Y. 591; *Jarvis' Case*, 1 C. H. Rec. 105; *State v. Ward*, 49 Conn. 429; *People v. Shulman*, 80 N. Y. 374, note.

It is not competent for the prosecution to show, for the purpose of proving the *scienter*, that the accused has received other property, from other persons, knowing the same to have been stolen. *Coleman v. People*, 55 N. Y. 82. *Contra, Com. v. Johnson*, 12 Crim. L. Mag. 641.

Evidence of the conversations between the parties upon the former occasions is competent as part of the *res gestæ*, and to show that the former receipts were with knowledge. *Copperman v. People*, 56 N. Y. 591.

Where the accused is a pawnbroker, evidence of prior purchases by him of similar stolen articles is not incompetent, because it establishes that the accused was also guilty of violating another statute, or an ordinance prohibiting licensed pawnbrokers from buying property. *Copperman v. People*, 56 N. Y. 591.

It is not competent to prove that defendant's house is a resort of felons, who come there to dispose of stolen property. *People v. Pierpont*, 1 Wheel. C. C. 139.

It may be shown, however, that there is a general understanding between the thief and the receiver, but not the special act of receiving other goods than

those charged in the indictment. *McNiff's Case*, 1 C. H. Rec. 3; *Bell's Case*, 6 id. 96; *People v. Green*, 1 Wheel. C. C. 153.

In *Miller v. People*, 25 Hun, 473, the jury brought in a verdict in writing, finding "the prisoner guilty of receiving stolen goods, knowing them to be stolen." Held, that the verdict was a special one, and could not be enlarged by intendment, and that as it did not find that the prisoner received the goods feloniously, it was not sufficient to sustain a conviction.

A person may be tried and convicted of the offense of feloniously receiving and having stolen goods, either in the county where the prisoner originally received the stolen property or in any county in which he afterward had it. *Wills v. People*, 3 Park. 473; *State v. Ward*, 49 Conn. 429.

An indictment for receiving with guilty knowledge goods stolen from a railroad train, may be found and tried in any county through which the train passed. Laws 1877, chap. 167; *People v. Dowling*, 84 N. Y. 479.

§ 551. **Averment and proof.** — It is not necessary to aver, in an indictment for an offense specified in the last section, nor to prove upon the trial thereof, that the principal who stole the property has been convicted, or is amenable to justice.

Where the evidence shows that defendant in conjunction with another person stole the goods, he cannot be convicted of receiving stolen goods. *People v. Brien*, 53 Hun, 496; 6 N. Y. Cr. Rep. 166; *Gaither v. State*, 8 Crim. L. Mag. 754.

CHAPTER V.

EXTORTION AND OPPRESSION.

SECTION 552. "Extortion" defined.

553. What threats may constitute extortion.

554. Punishment of extortion in certain cases.

555. Compulsion to execute instrument.

556, 557. Oppression and extortion committed under color of official right.

558. Blackmail.

559. Written threat.

560. Attempts to extort money, or property, by verbal threats.

561. Unlawful threat referring to act of third person.

§ 552. "**Extortion**" defined. — Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

The procuring of money from another induced by a threat to continue a "boycott" constitutes extortion. *People v. Wileig*, 4 N. Y. Cr. Rep. 403.

The right to take and prosecute an appeal is property. *People v. Cadman*, 57 Cal. 562.

§ 553. What threats may constitute extortion. — Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family; or,
2. To accuse him, or any relative of his, or any member of his family, of any crime, or,
3. To expose, or impute to him, or any of them, any deformity or disgrace; or,
4. To expose any secret affecting him or any of them.

§ 554. Punishment of extortion in certain cases. — A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding five years.

§ 555. Compulsion to execute instrument. — The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting, or intended to affect, any cause of action or defense, or any property, is an extortion of property within the last two sections.

§ 556. Extortion committed under color of official right. — A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority,

1. Arrests another, or detains him against his will; or,
 2. Seizes or levies upon another's property; or,
 3. Dispossesses another of any lands or tenements; or,
 4. Does any other act whereby another person is injured in his person, property or rights;
- Commits oppression, and is guilty of a misdemeanor.

§ 557. Extortion committed under color of official right. — A public officer who asks or receives, or agrees to receive, a fee or other compensation for his official service, either,

1. In excess of the fee or compensation allowed to him by statute therefor; or,

2. Where no fee or compensation is allowed to him by statute therefor;

Commits extortion, and is guilty of a misdemeanor.

§ 558. **Blackmail.** — A person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received, or makes and parts with for the purpose that there may be sent or delivered, any letter or writing, threatening,

1. To accuse any person of a crime; or,
 2. To do any injury to any person or to any property; or,
 3. To publish or connive at publishing any libel; or,
 4. To expose or impute to any person any deformity or disgrace;
- Is punishable by imprisonment for not more than five years.

See *People v. Gillian*, 50 Hun, 37. "Blackmail" is synonymous with "extortion." *Edsall v. Brooks*, 17 Abb. Pr. 226.

It is not necessary to show that the threat was against the person to whom the letter was directed, or that the writer was the one threatening to do the wrongful act. The offense may be committed by sending a letter conveying a threat to some other person, providing it is sent for the unlawful purpose mentioned in this section. *People v. Thompson*, 97 N. Y. 313; 2 N. Y. Cr. Rep. 520.

A false accusation in writing of an act involving moral turpitude known by the party making it to be false, accompanied with a suggestion that legal proceedings will be taken unless the person against whom it is made purchase silence, may be a threat within this section, although in form the accused is simply called upon to render satisfaction for that which, if the charge was true, would entitle the accuser to pecuniary compensation. The indictment charged that defendant, well knowing the contents, and with intent to extort money, did feloniously send and cause to be forwarded to and received by the prosecutor, a letter which, after stating that the writer had been informed by A. that there had been sexual intercourse between her and the prosecutor, concluded as follows: "I suppose you are aware that under these conditions you are liable for the support of the child and the mother's expenses during her sickness? Are you willing to make suitable provisions for said liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter?" The record stated that the people introduced evidence tending to prove the acts charged. *Held*, that the evidence not appearing in the record, it would be assumed that the jury were justified in finding that defendant knowingly sent the letter for the purpose of extortion, and that the conviction should be affirmed. *People v. Wightman*, 104 N. Y. 598; affirming 43 Hun, 358.

§ 559. Written threat.— A person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received, any letter or other writing, threatening to do any unlawful injury to the person or property of another, or any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing with or without a name subscribed thereto or signed with a fictitious name or with any letter, mark or other designation, with intent thereby to cause annoyance to any person, is guilty of misdemeanor.

It is a crime to send or deliver a letter containing a threat made for the purpose of inducing an appellant to dismiss an appeal, and it matters not whether the letter be subscribed or not. *People v. Cadman*, 57 Cal. 562.

Where an indictment was found for sending a threatening letter, with the intent to extort money, and the indictment charged that the defendant "feloniously, knowingly and unlawfully, did send to one A. a certain letter and paper writing, with intent to extort and gain from him, the said A., a large sum of money," etc., held, that the language sufficiently imported that it was A.'s property defendant intended to extort, and that it was not necessary that the words "belonging to said A." should be added. *Biggs v. People*, 8 Barb. 547.

The failure to add the words "belonging to said A." is a formal defect, and may be disregarded, because it does not in any respect tend to the prejudice of the defendant. *Biggs v. People*, 8 Barb. 547.

A charge of an intent to extort and gain money from A. necessarily implies that it is A.'s property that is intended. *Biggs v. People*, 8 Barb. 547.

§ 560. Attempts to extort money, or property, by verbal threats.— A person who, under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, verbally makes such a threat as would be criminal under either of the foregoing sections of this chapter, if made or communicated in writing, is guilty of a misdemeanor.

§ 561. Unlawful threat referring to act of third person. It is immaterial whether a threat, made as specified in this chapter, is of things to be done or omitted by the offender, or by any other person.

CHAPTER VI.

FALSE PERSONATION, AND CHEATS.

SECTION 562. Falsely personating another.

563. Limitations as to indictments.

564. Receiving property in false character.

565. Personating officers, firemen, and other persons.

566. Obtaining property by false pretenses.

567. Obtaining property for charitable purposes.

SECTION 568. Obtaining negotiable evidences of debt by false pretences.

569. Using false check or order for payment of money.

570. Obtaining employment, etc.

571. Secreting personal property.

572. Pawning, etc., borrowed property.

573. Personating beneficiary of entrance ticket.

574. Mock auctions.

§ 562. Falsely personating another. — A person who falsely personates another, and, in such assumed character,

1. Marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of the latter; or,

2. Becomes bail or surety for a party in an action or special proceeding, civil or criminal, before a court or officer authorized to take such bail or surety; or,

3. Confesses a judgment; or,

4. Subscribes, verifies, publishes, acknowledges, or proves a written instrument, which by law may be recorded, with intent that the same may be delivered or used as true; or,

5. Does any other act, in the course of any action or proceeding, whereby, if it were done by the person falsely personated, such person might in any event become liable to an action or special proceeding, civil or criminal, or to pay a sum of money, or to incur a charge, forfeiture, or penalty, or whereby any benefit might accrue to the offender, or to another person;

Is punishable by imprisonment in a state prison for not more than ten years.

§ 563. Limitations as to indictments. — An indictment cannot be found, for the crime specified in subdivision first of the last section, except upon the complaint of the person injured, if there be any such person living, and within two years after the perpetration of the crime.

§ 564. Receiving property in false character. — A person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person who is not entitled thereto, is punishable in the same manner and to

the same extent, as for larceny of the money or property so received.

§ 565. **Personating officers, firemen, and other persons.**— A person, who falsely personates a public officer, civil or military, or a policeman, or a private individual having special authority by law to perform an act affecting the rights or interests of another, or who assumes, without authority, any uniform or badge by which such an officer or person is lawfully distinguished, and in such assumed character does an act, purporting to be an official, whereby another is injured or defrauded, is guilty of a misdemeanor.

Personating a police officer in making an arrest or threatening so to do. *McCord v. People*, 46 N. Y. 470; *People v. Stetson*, 4 Barb. 151.

A port warden of another state holding himself out as port warden in this state punishable under this section. *Curlin v. People*, 26 Hun, 564.

§ 566. **Obtaining signature by false pretenses.**— A person, who, with intent to cheat or defraud another, designedly, by color or aid of a false token or writing, or other false pretense, obtains the signature of any person to a written instrument, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than three times the value of the money or property affected or obtained thereby, or by both such fine and imprisonment.

See §§ 528, 529, 544, *ante*.

The intent to cheat and defraud is an essential element in the offense of obtaining the signature of a person to a deed by false pretenses. *Brown v. People*, 16 Hun, 535; *Therasson v. People*, 20 id. 55; 82 N. Y. 238. See, also, *Lesser v. People*, 12 Hun, 670; *Rex v. Jackson*, 8 Camp. 370; *Rex v. Parker*, 3 C. & P. 825.

§ 566A. **False pedigree of animals.**— Every person who by any false pretense shall obtain from any club, association, society or company for improving the breed of cattle, horses, sheep, swine and other domestic animals, the registration of any animal in the herd register or other register of any such club, association, society or company, or a transfer of any such registration, and every person who shall knowingly give a false pedigree of any animal, shall be deemed guilty of a misdemeanor, and upon cor

viction thereof shall be punished by imprisonment in a county jail for a term not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

§ 567. Obtaining property for charitable purposes.—

A person, who willfully, by color or aid of any false token or writing, or other false pretense, obtains the signature of any person to any written instrument, or any money or property, for any alleged or pretended charitable or benevolent purpose, is punishable by imprisonment for not less than one nor more than three years, or by a fine to an amount not exceeding the value of the money or property obtained, or by both.

See *People v. Clough*, 17 Wend. 351.

§ 568. Obtaining negotiable evidence of debt by false pretenses. — If the false token, by which money or property is obtained in violation of sections five hundred and sixty-six and five hundred and sixty-seven, is a promissory note or other negotiable evidence of debt purporting to be issued by or under the authority of any banking company or corporation not in existence, the person guilty of such cheat is punishable by imprisonment in a state prison not exceeding seven years, instead of by the punishment prescribed by those sections.

See *People v. Rynders*, 12 Wend. 425.

§ 569. Using false cheque or order for payment of money. — The use of a matured cheque, or other order for the payment of money, as a means of obtaining a signature, or money or property, such as is specified in sections five hundred and sixty-six and five hundred and sixty-seven, by a person who knows that the drawer thereof is not entitled to draw for the sum specified therein, upon the drawee, is the use of a false token within the meaning of those sections, although no representation is made in respect thereto.

See § 529, *ante*; *People v. Clements*, 42 Hun, 289; 5 N. Y. Cr. Rep. 280.

Obtaining money on a post-dated check drawn by one who never had an account in a bank and who could not be found, is within the statute. *Lesser v. People*, 12 Hun, 668; 73 N. Y. 78; *Foot v. People*, 17 Hun, 218. *Contra*, see *Van Pell's Case*, 1 C. H. Rec. 138.

An attempt to obtain money from a bank by means of a forged letter transmitting a certificate of deposit, is within the statute. *People v. Ward*, 15 Wend. 231. See, also, *Conger's Case*, 4 C. H. Rec. 65; *People v. Tompkins*, 1 Park. 224.

§ 570. **Obtaining employment, etc.**—A person who obtains employment, or appointment to any office or place of trust by color or aid of any false or forged letter or certificate of recommendation, or of any false statement in writing as to his name, residence, previous employment or qualification, or any person who shall willfully and intentionally fraudulently represent himself or herself to be a deaf and dumb person in order to collect, receive or otherwise obtain moneys, food, clothing or any thing of value whatsoever, is guilty of a misdemeanor.

§ 571. **Secreting personal property.**—A person who, having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secretes or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee, or a purchaser thereof, is guilty of a misdemeanor.

See *People, ex rel. Stokes, v. Riseley*, 38 Hun, 281; 4 N. Y. Cr. Rep. 110; *Vans v. Middlebrook*, 3 N. Y. State Rep. 277.

Permission to sell is a defense. *Millechamp v. People*, 14 Week. Dig. 452.

Not so, however, where the mortgagor was to turn over the price to the mortgagee. *Id.*

§ 572. **Pawning, etc., borrowed property.**—A person who, without the consent of the owner thereof, sells, pledges, pawns, or otherwise disposes of any property which he has borrowed or hired from the owner, is guilty of a misdemeanor; but this section does not apply to a person leasing or lending property, for a time not exceeding that for which the same was leased or lent to himself. [*As amended; in effect May 18, 1892.*]

See § 355, *ante*.

§ 573. **Personating beneficiary of entrance ticket.**—A person who, with intent to wrongfully convert to his own use the benefits secured by any ticket, contract, or other paper or writing, appearing upon its face not negotiable, and which entitles or purports to entitle the person whose name appears therein, to entrance upon the grounds or premises of a membership corporation, or being thereupon, to remain upon such grounds or premises, falsely personates or attempts to so personate any individual named in such ticket, contract or other paper or writing, as the grantee or beneficiary thereof, is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 574. **Mock auctions.**— A person who obtains money or property from another, or obtains the signature of another to any writing, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property by auction, or by any of the practices known as mock auctions, is punishable by imprisonment in a state prison not exceeding three years, or in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment; and in addition thereto he forfeits any license he may hold to act as an auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this state.

See § 448, *ante*.

CHAPTER VII.

FRAUDULENTLY FITTING OUT AND DESTROYING VESSELS.

SECTION 575. Person willfully destroying vessel, etc.

576. Fitting out or lading any vessel, with intent to wreck the same.

577. Making false manifest, etc.

§ 575. **Person willfully destroying vessel, etc.**— A person who wrecks, burns, sinks, scuttles, or otherwise injures or destroys a vessel, or the cargo of a vessel, or willfully permits the same to be wrecked, burned, sunk, scuttled, or otherwise injured or destroyed, with intent to prejudice or defraud an insurer or any other person, is punishable by imprisonment for not more than five years.

§ 576. **Fitting out or lading any vessel with intent to wreck the same.**— A person who fits out any vessel, or who lades any cargo on board of a vessel, who with intent to permit or cause the same to be wrecked, sunk or otherwise injured or destroyed, or thereby to defraud or prejudice an insurer or another person, is punishable by imprisonment in the state prison not exceeding ten years. [*Amended; in effect May 17, 1892.*]

§ 577. **Making false manifest, etc.**— A person, guilty of preparing, making or subscribing, a false or fraudulent manifest, invoice, bill of lading, ship's register or protest, with intent to defraud another, is punishable by imprisonment in a state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both.

CHAPTER VIII.*

MISCONDUCT AND FRAUDS IN RELATION TO INSURANCE CORPORATIONS, ASSOCIATIONS AND SOCIETIES.

SECTION 577a. False statements in application for membership.

577b. Discriminations and rebates by life insurance corporations prohibited.

577c. Acting as agent of life insurance corporation without certificate of authority.

577d. Fire insurance corporations to use standard policy only.

577e. Overcharges by marine insurance agents.

577f. Misconduct of officers and agents of corporations for the insurance of domestic animals.

577g. Transfers to and reinsurance of risks in unauthorized foreign corporations prohibited to co-operative associations.

577h. Misconduct of officers and agents of co-operative insurance companies.

577i. Acts of agents of fire or marine insurance corporations organized in other countries, after revocation of certificate.

577j. Acting for foreign insurance corporation which has not designated superintendent of insurance as attorney.

578. Destroying property insured.

579. Presenting false proof of loss in support of claim upon policy of insurance.

§ 577a. False statements in applications for membership.—Any applicant, officer, agent, solicitor, examining physician, surgeon or other person, who knowingly or willfully makes any false or fraudulent statements or representations in or with reference to any application for membership or reinstatement or any other documentary or other proof for the purpose of obtaining or reinstating membership in or benefit from any fraternal beneficiary society, order or association, any corporation, association or society transacting the business of life or casualty insurance or both, upon the co-operative or assessment plan, or a corporation for the insurance of domestic animals, is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1898; Laws 1893, ch. 692.

§ 577b. Discriminations and rebates by life insurance corporations prohibited.—Any life insurance corporation doing business in this state, or any officer or agent thereof, who,

1. Makes any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of

* With the exception of sections 578 and 579 the whole of this chapter was added by Laws 1892, chapter 692; in effect May 18, 1892.

the premium charged or in any return of premiums, dividends or other advantages, or

2. Makes any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued, or

3. Pays or allows, or offers to pay or allow as an inducement to any person to insure, any rebate or premium, or any special favor or advantage whatever, in the dividends to accrue thereon or any inducement whatever not specified in the policy, or

4. Makes any distinction or discrimination between white persons and colored persons, wholly or partially of African descent, as to the premiums or rates charged for policies upon the lives of such persons, or in any other manner whatever; or demands or requires a greater premium from such colored persons than is at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; or makes or requires any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored persons insured, or inserts in the policy any condition, or makes any stipulation whereby such person insured shall bind himself, or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases, is guilty of a misdemeanor.

§ 577c. Acting as agent of life insurance corporation without certificate of authority.—Any person acting as agent, sub-agent or broker of a life insurance corporation doing business in this state, except as agent operating solely on the weekly payment plan of insurance, who solicits or procures applications for insurance without first procuring a certificate of authority from the superintendent of insurance, is guilty of a misdemeanor.

§ 577d. Fire insurance corporations to use standard policy only.—Any fire insurance corporation, or any officer or agent thereof, who makes, issues, delivers, or offers to deliver any policy of insurance on property in this state, which does not conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form or* contract of* policy filed in the office of the secretary of state, known and designated as the "Standard fire insurance policy of the state of New York," except as to such exceptions as are specially provided and allowed by law, is guilty of a misdemeanor, punishable by a fine of not less than twenty-five nor more than one hundred dollars for the first offense, and of not less than one hundred or more than two hundred and fifty dollars for each subsequent offense.

*So in original.

§ 577e. Over-charges by marine insurance agents.—Any agent, shipper or other person, representing or acting for a marine insurance corporation doing business in this state; who,

1. Charges or receives, directly or indirectly from any person for insurance of any property in transit upon the canals of the state, any greater sum than the regular rates of premium fixed by the corporation for the insurance of such property; or,

2. Demands or receives upon any policy of insurance issued upon any such property, for the business of obtaining such insurance, a sum of money, as compensation or remuneration by way of salary, commission or in any other capacity, which includes in any case, over fifteen per centum of the premium, is guilty of a misdemeanor.

§ 577f. Misconduct of officers and agents of corporations for the insurance of domestic animals.—Any officer or agent of a corporation organized for the insurance of domestic animals who,

1. Refuses to make any report or perform any duty required by law; or,

2. Intentionally makes any false or fraudulent statement or report,

Is guilty of a misdemeanor punishable by a fine of not less than one hundred or more than five hundred dollars.

§ 577g. Transfers to and reinsurance of risks in unauthorized foreign corporations prohibited to co-operative associations.—Any officer, manager, director or agent of a casualty insurance corporation upon the co-operative or assessment plan, organized under the laws of this state, who transfers its risks or assets or any part thereof to or reinsures its risks or any part thereof, in any insurance corporation or association of another state or country which is not, at the time of such transfer or reinsurance authorized by law to do insurance business in this state, is guilty of a misdemeanor.

§ 577h. Misconduct of officers and agents of co-operative insurance companies.—Any officer, agent or representative of a corporation, association, or society doing a life or casualty insurance business or both, upon the co-operative or assessment plan, who,

1. Neglects or refuses to perform any duty required of him by law; or,

2. Intentionally makes any false or fraudulent statement or report; or,

3. Refuses to permit the superintendent of insurance or any examiner duly authorized by him for the purpose, to make an examination of the condition and business, books, papers and vouchers of any such corporation, association or society; or,

4. Thirty days after any such corporation has been notified by the superintendent of insurance to designate some person residing in the same city, village or town where the principal business office within the state of such corporation is located, as a person upon whom service of legal process and papers may be made, as provided by law, collects any money or issues any certificate in carrying on such business, during the failure of such corporation to designate such person; or,

5. Being within this state the agent or representative of any such corporation, association or society, which has neglected or refused to comply with any duty imposed upon it by law, or which has failed or neglected to procure from the superintendent of insurance the certificate of authority to transact business within this state as provided by law, acts as such agent, during such period of default,

Is guilty of a misdemeanor.

§ 577i. Acts of agents of fire or marine insurance corporation, organized in other countries, after revocation of certificate.—Any agent of a fire or marine insurance corporation, incorporated by or existing under the government or laws of another country than the United States, and doing business in this state, who issues any new policy of insurance after having been notified by the superintendent of insurance that the certificate of such corporation to do business within this state has been revoked, is guilty of a misdemeanor.

§ 577j. Acting for foreign insurance corporation which has not designated superintendent of insurance as attorney.—Any person acting for himself or for others not having been specially licensed, as provided by law, by the superintendent of insurance, who solicits or procures, or aids in the solicitation or procurement of policies or certificates of insurance from, or adjusts losses or in any manner aids the transaction of any business for, any foreign insurance corporation, which has not executed and filed in the office of the superintendent of insurance, a written appointment of the superintendent to be the true and lawful attorney of such corporation in and for this state, upon whom all lawful process in any action or proceeding against the corporation may be served, is guilty of a misdemeanor.

§ 578. **Destroying property insured.** — A person who, with intent to defraud or prejudice the insurer thereof, willfully burns, or in any manner injures or destroys property not included or described in section five hundred and seventy-five, which is insured at the time against loss or damage by fire or by any other casualty, under such circumstances that the offense is not arson in any of its degrees, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

§ 579. **Presenting false proofs of loss in support of claim upon policy of insurance.** — A person who knowing it to be such, either presents or causes to be presented a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or,

Prepares, makes or subscribes a false or fraudulent account, certificate, affidavit of proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim,

Is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

CHAPTER IX.

FALSE WEIGHTS AND MEASURES.

SECTION 580. Using false weights, measures, etc.

581. Keeping false weights.

582. False weights and measures authorized to be seized.

583. May be tested by committing magistrate, and destroyed or delivered to district attorney.

584. Shall be destroyed after conviction of offender.

585. Stamping false weight or tare on casks or packages.

585a. Violations of regulations for sale of baled hay and straw.

§ 580. **Using false weights, measures, etc.** — A person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure, or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor.

§ 581. **Keeping false weights.**—A person who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor.

§ 582. **False weights and measures authorized to be seized.**—A person who is authorized or enjoined by law to arrest another person for a violation of the last two sections, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

§ 583. **May be tested by committing magistrate, and destroyed or delivered to district attorney.**—The magistrate to whom any weight or measure is delivered pursuant to the last section, must upon the examination of the defendant, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and if he finds it to be false, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice in his judgment require.

§ 584. **Shall be destroyed after conviction of offender.**—Upon the conviction of the defendant, the district attorney must cause any weight or measure, in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney, to be destroyed.

§ 585. **Stamping false weight or tare on casks or packages.**—A person who knowingly marks or stamps false or short weights, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor.

§ 585a. **Violations of regulations for sale of baled hay and straw.**—A person who:

1. Sells or offers for sale baled hay or straw containing more than twenty pounds of wood to the bale, the weight of which is two hundred pounds or upward, or more than ten pounds of wood to the bale the weight of which is less than two hundred pounds; or
2. Sells or offers for sale any bale of hay or straw upon which the correct gross weight is not plainly marked or which weighs more than five pounds less than the gross weight so marked thereupon, is guilty of a misdemeanor.

Added Laws 1898, ch. 692; takes effect Oct. 1, 1898.

CHAPTER X.

FRAUDULENT INSOLVENCIES BY INDIVIDUALS.

SECTION 586. Fraudulent conveyances.

587. Fraudulent removal of property to prevent levy.

588. Knowingly receiving property.

589. Concealment of effects of insolvent debtor.

§ 586. Fraudulent conveyances. — A person who either,

1. Becomes a party to a conveyance or assignment of real or personal property, or of an interest therein, with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons ; or,

2. Being a party or privy to, or knowing of, such a conveyance or assignment so made, willfully puts the same in use as having been made in good faith ;

Is guilty of a misdemeanor.

See *Lapham v. Marshall*, 51 Hun, 39-40.

§ 587. Fraudulent removal of property to prevent levy. — A person who, with intent to defraud a creditor, or to prevent any of his property from being made liable for the payment of any of his debts, or levied upon by an execution or warrant of attachment, removes any of his property, or secretes, assigns, conveys, or otherwise disposes of the same ; or with intent to defraud a creditor, removes, secretes, assigns, conveys or otherwise disposes of any of his books of account, accounts, vouchers or writings in any way relating to his business affairs, or destroys, obliterates, alters or erases any of such books of account, accounts, vouchers or writings, or any entry, memorandum or minute therein contained, is guilty of a misdemeanor.

In effect May 10, 1893; Laws 1893, ch. 587.

See *Loomis v. People*, 19 Hun, 601; 46 How. Pr. 247.

Bona fide removal no offense. *Thomas v. People*, 19 Wend. 480; *People v. Morrison*, 13 id. 399.

§ 588. Knowingly receiving property. — A person who receives any property from another knowing that the same is transferred or delivered to him in violation of, or with intent to violate, the last section, is guilty of a misdemeanor.

§ 589. Concealment of effects of insolvent debtor.—A person who, being an applicant, as an insolvent debtor, for a discharge from his debts, or for exoneration or discharge from imprisonment, or having made a general assignment of his property for the payment of his debts, willfully either,

1. Conceals any part of his estate or effects, or any book, account, or other writing relative thereto; or,

2. Omits to disclose to the court before which his application is pending, any debt or demand which he has collected, or any transfer of property which he has made, since the presentation of his application; or,

3. Fraudulently presents, or authorizes to be presented in his behalf, such an application, in a case where it is not authorized by law; or,

4. Makes or presents to the court or officer in support of such an application, a petition, schedule, book, account, voucher, or other paper or document, knowing the same to contain a false statement; or,

5. Fraudulently makes and exhibits, or alters, obliterates, or destroys an account or voucher, relating to the condition of his affairs, or an entry or statement in such an account or voucher; or,

6. Commits any fraud upon a creditor, to induce him to petition for, or consent to such a discharge; or,

7. Conspires with, or induces another fraudulently to consent as creditor to a petition for such discharge, or to practice any fraud in aid thereof;

Is guilty of a misdemeanor.

What circumstances amount to a concealing of property under this section. *McButt v. Hirsch*, 4 Abb. 441.

A person having a watch on his person, and refusing to deliver it to the officer, is not a concealing within this section. *People v. Morrison*, 13 Wend. 399.

A debtor arrested for concealing, etc., is entitled to a regular examination as in any other case. *Ion v. People*, 12 Wend. 344; *Vanderwerken v. People*, 6 id. 580.

Threat to assign or secrete. *Gashier v. Apple*, 14 Abb. 64; *Dickinson v. Benham*, 10 id. 390; 19 id. 158.

CHAPTER XI.

**FRAUDULENT INSOLVENCIES BY CORPORATIONS AND OTHER FRAUDS
IN THEIR MANAGEMENT.****SECTION 590. Frauds in the organization of corporations.**

- 591. Fraudulent issue of stock, scrip, etc.
- 592. Frauds in procuring organization of corporation, or increase of capital.
- 593. Acting for foreign corporations not authorized to do business in this state.
- 594. Misconduct of directors of stock corporations.
- 595. Misconduct of directors of banking corporations.
- 596. Loans made in violation of last section, not invalid.
- 597. Sale or hypothecation of bank notes by officer, etc.
- 598. Officer of bank putting excessive number of its notes in circulation.
- 599. Officer or agent of banking corporation, making guaranty or indorsement, in its behalf, in certain cases.
- 600. Bank officer overdrawing his account.
- 601. Receiving deposits in insolvent bank.
- 602. Unlawful investments by officers of savings banks.
- 603. Misconduct by directors of monied corporations.
- 604. Misconduct by banks and bankers.
- 605. Unlawful discount of bills of foreign banks.
- 606. Misconduct by officers of banking department
- 607. Using dies and plates of extinct state bank.
- 609. Private banker using sign.
- 610. Misconduct of officers and directors of stock corporations.
- 611. Misconduct of officers and employes of corporations.
- 612. Misconduct of officers and agents of pipe-line corporations.
- 613. Misconduct at corporate elections.
- 614. Presumption of knowledge of corporate condition and business, and of assent thereto by directors; definitions.

§ 590. Frauds in the organization of corporations.—A person who :

1. Without authority subscribes the name of another to or inserts the name of another in any prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association ; or,

2. Signs the name of a fictitious person to any subscription for

or agreement to take stock in any corporation, existing or proposed; or,

3. Signs to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced;

Is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 591. **Fraudulent issue of stock, scrip, etc.**—An officer, agent or other person in the service of any joint-stock company, or corporation formed or existing under the laws of this state, or of the United States, or of any state or territory thereof, or of any foreign government or country, who willfully and knowingly, with intent to defraud, either,

1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or executes, or causes to be signed or executed, with intent to sell, pledges or issues, or causes to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or,

2. Re-issues, sells, pledges or disposes of, or causes to be re-issued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares,

Is punishable by imprisonment for a term not exceeding seven years, or by a fine not exceeding three thousand dollars, or by both. [*Amended; in effect May 17, 1892.*]

§ 592. **Frauds in procuring organization of corporation, or increase of capital.**—An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly ex-

hibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years. [*Amended; in effect May 17, 1892.*]

§ 593. **Acting for foreign corporations not authorized to do business in this state.**—Any person or corporation who acts as agent or representative of any mortgage company or co-operative loan and building association organized outside of this state, while such mortgage company or co-operative loan and building association shall not be authorized under a license of the superintendent of banks to do business in this state, is guilty of a misdemeanor. [*As amended, in effect May 18, 1892.*]

§ 594. **Misconduct of directors of stock corporations.**—A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended,

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; or,

6. To receive any such shares in payment or satisfaction of a debt due to such corporation; or,

7. To receive in exchange for the shares, notes, bonds or other

evidences of debt of such corporation, shares of the capital stock, notes, bonds or other evidences of debt issued by any other stock corporation engaged in another line of business unless authorized by law to make such exchange,

Is guilty of a misdemeanor. [*Subd. 7, amended; in effect May 18, 1892.*]

§ 595. Misconduct of directors of banking corporations.

—A director of a corporation, organized under the laws of this state, having banking powers, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either,

1. To make a loan or discount, by which the whole amount of the loans and discounts of the corporation shall be greater than the amount allowed by law, or, where there is no express statutory limitation of the amount, greater than three times its capital stock then paid in and actually possessed; or,

2. To make a loan or discount to any director of such corporation, or upon paper upon which any such director is responsible to an amount exceeding the amount allowed by statute, or where there is no express statutory limitation of the amount, exceeding in the aggregate one-third of the capital stock of such corporation then paid in and actually possessed;

Is guilty of a misdemeanor.

§ 596. Loans made in violation of last section not invalid.—Nothing in the last section shall render any loan made by the directors of any such corporation, in violation thereof, invalid.

§ 597. Sale or hypothecation of bank notes by officer, etc.—An officer or agent of any corporation having banking powers, who sells or causes or permits to be sold, any bank notes of such corporation, or pledges or hypothecates, or causes or permits to be pledged or hypothecated, with any other corporation, association or individual, any such notes, as a security for a loan or for any liability of such corporation, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

§ 598. Officer of bank putting excessive number of its notes in circulation.—An officer or agent of any corporation having banking powers, who issues or puts in circulation, or causes

or permits to be issued or put in circulation, the bank notes of such corporation to an amount which, together with previous issues, leaves in circulation or outstanding a greater amount of notes than such corporation is allowed by law to issue and circulate, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

§ 599. Officer or agent of banking corporation making guaranty or indorsement, in its behalf, in certain cases.

—An officer or agent of any banking corporation, who makes or delivers any guaranty or indorsement on behalf of such corporation, whereby it may become liable upon any of its discounted notes, bills or obligations, in a sum beyond the amount of loans and discounts which such corporation may legally make, is guilty of a misdemeanor.

§ 600. Bank officer overdrawing his account.—An officer, agent, teller or clerk of any bank, banking association or savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor.

It is the *wrongful obtaining* of money, etc., which is prohibited, and "wrongful" implies more than the mere want of funds in the bank at the time of the obtaining. *People v. Clements*, 5 N. Y. Cr. Rep. 187.

What must be shown in order to convict, see *People v. Clements*, 5 N. Y. Cr. Rep. 277; 42 Hun, 286.

Either the prosecution or defense may prove the actual state of the account at the time of the alleged offense, and defendant's guilt is to be determined thereby. *People v. Upton*, 4 N. Y. Cr. Rep. 455.

§ 601. Receiving deposits in insolvent bank.—An officer, agent, teller or clerk of any bank, banking association or savings bank, and every individual banker or agent, and any teller or clerk of an individual banker, who receives any deposits knowing that such bank or association or banker is insolvent, is guilty of a misdemeanor.

See *Atkinson v. Rochester Printing Co.*, 114 N. Y. 175; *People v. Moore*, 8 N. Y. Cr. Rep. 458.

§ 602. Unlawful investments by officers of savings banks.—Any officer or trustee of a savings bank authorizing

or making any investment of the funds of the bank in securities, not authorized by law, is guilty of a misdemeanor.

This section was first amended by chapter 662, Laws 1892, which went into effect May 17, 1892, and again amended by chapter 692, Laws 1892, which went into effect May 18, 1892.

§ 603. **Misconduct by directors of monied corporations.**—Every director of a monied corporation who :

1. In case of the fraudulent insolvency of such corporation, shall have participated in such fraud ; or,

2. Willfully does any act as such director which is expressly forbidden by law, or willfully omits to perform any duty imposed upon him as such director by law ;

Is guilty of a misdemeanor, if no other punishment is prescribed therefor by law.

The insolvency of a monied corporation is deemed fraudulent unless its affairs appear upon investigation to have been administered fairly, legally and with the same care and diligence that agents receiving a compensation for their services are bound, by law, to observe. [*As amended; in effect May 18, 1892.*]

See Moak's Underhill Torts, 532 *et seq.*; *Cross v. Sackett*, 6 Abb. Pr. 247; *Harper v. Chamberlain*, 11 id. 234.

§ 604. **Misconduct by banks and bankers.**—Any monied corporation or individual banker authorized to carry on the business of banking under the laws of this state who :

1. Receives, pays out, gives or offers in payment as money to circulate, or who attempts to circulate as money, any bill, note or other evidence of debt issued or purporting to have been issued by any corporation or individual, situated or residing without this state, and which bill, note or other evidence of debt shall, upon any part thereof, purport to be payable or redeemable at any place or by any corporation or individual within this state ; or,

2. Issues, utters or circulates, as money, or in any way, directly or indirectly, aids or assists in the issuing, uttering or circulating as money within this state, of any bank bill, note or other evidence of debt in the similitude of a bank note issued or purporting to have been issued by any corporation or individual situated or residing without this state ; or procures or receives, in any manner whatever, any such bank bill, note or other evidence of debt with

intent to issue, utter or circulate, or with intent to aid in issuing, uttering or circulating the same as money within this state; or,

3. Directly or indirectly lends or pays out for paper discounted or purchased any bank bill, note or other evidence of debt, which is not received at par by such corporation or banker for debts due such corporation or banker; or,

4. Issues or puts in circulation any bank bill or note of any such corporation or banker, unless the same shall be made payable on demand and without interest, except bills of exchange on foreign countries or places beyond the limits or jurisdiction of the United States;

Is guilty of a misdemeanor. Nothing in this section contained shall be construed to prohibit any such corporation or banker from receiving and paying out such foreign bank bills as they shall receive at par in the ordinary course of their business, or to prohibit such corporation or banker from receiving foreign notes from their dealers and customers in the regular and usual course of their business, at a rate of discount not exceeding that which is or shall be at the time fixed by law, for the redemption of the bills of the banks of this state at their agencies, or from obtaining from the corporations, associations or individuals by which such foreign notes are made, the payment or redemption thereof. [*As amended; in effect May 18, 1892.*]

§ 605. **Unlawful discount of bills of foreign banks.**—Any person, association or corporation within the state who, directly or indirectly, on any pretense whatever, procures or receives or offers to receive from any corporation or person any bank bill or note or other evidence of debt in the similitude of a bank note issued or purporting to have been issued by any corporation or individual, situated or residing without this state, at a greater rate of discount than is or shall be at the time fixed by law for the redemption of the bills of the banks of this state at their agencies, is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 606. **Misconduct by officers of banking department.**—The superintendent of banks, or any officer in the banking department who countersigns bills or notes for any person or corporation exceeding the value of the interest-bearing stocks of the state of New York or of the United States, or other securities deposited with such superintendent by such person or corporation on

account thereof, is guilty of a felony, punishable by a fine of not less than five thousand dollars or by imprisonment for not less than five years, or by both. [*As amended; in effect May 18, 1892.*]

§ 607. **Using dies and plates of extinct state bank.**—Any person who uses the dies and plates of a state bank in the manufacture of notes and bills, after such bank has become a national bank in pursuance of law, is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 608. Repealed in 1884, chap. 377.

§ 609. **Private banker using sign.**—Any person engaged in banking in this state, not subject to the supervision of the superintendent of banks, and not required by law to report to such superintendent, who was not engaged in such banking before May 23, 1885, who,

1. Uses an office sign at the place where such business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank; or,

2. Uses or circulates any letter-heads, bill-heads, blank notes, blank receipts, certificates, circulars or any written or printed paper whatever, having thereon any artificial or corporate name, or other word or words indicating that such business is the business of a bank;

Is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 610. **Misconduct of officers and directors of stock corporations.**—An officer or director of a stock corporation who:

1. Issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law; or,

2. Sells, or agrees to sell, or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share;

Is guilty of a misdemeanor, punishable by imprisonment for not less than six months, or by a fine not exceeding five thousand dollars, or by both. [*As amended; in effect May 18, 1892.*]

§ 611. **Misconduct of officers and employes of corporations.**—A director, officer, agent or employe of any corporation or joint-stock association who:

1. Knowingly receives or possesses himself of any of its prop-

erty otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts ; or,

2. Concurs in omitting to make any material entry thereof ; or,

3. Knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false ; or,

4. Having the custody or control of its books, willfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected and extracts to be taken therefrom by any person entitled by law to inspect the same or to take extracts therefrom ; or,

5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof ; or,

6. Refuses or neglects to make any report or statement lawfully required by a public officer ;

Is guilty of a misdemeanor.

In effect, as amended, May 18, 1892; Laws 1892, ch. 692.

Subd. 4, as amended, Laws 1893, ch. 692, takes effect Oct. 1, 1893.

§ 612. Misconduct of officers and agents of pipe-line corporations.—Any officer, agent or manager of a pipe-line corporation, who :

1. Neglects or refuses to transport any product delivered for transportation, or to accept and allow a delivery thereof in the order of application, according to the general rules of the corporation, as provided by law ; or,

2. Charges, accepts or agrees to accept for such receipt, transportation and delivery, a sum different from the amount fixed by such regulations ; or,

3. Allows or pays, or agrees to allow or pay, or suffers to be allowed or paid or repaid, any drawback, rebate or allowance, so that any person shall, by any device, have or procure any transportation of products over such pipe-line at a less rate or charge than is fixed in such regulations ;

Is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both. [*As amended ; in effect May 18, 1892.*]

§ 613. Misconduct of corporate elections.—Any person who :

1. Votes or issues a proxy to vote at any meeting of the stock-

holders or bondholders, or both, of a stock corporation, upon any stock or bond, if the person in whose behalf such vote is given shall not then have the title to the stock represented by such certificate or to such bond, and shall not have it in his possession and control, notwithstanding such stock or bond shall then stand on the books of such corporation in the name of the person in whose behalf such vote is given ; or,

2. Being entitled to vote at such meeting, sells his vote or issues a proxy to vote to any person for any sum of money or thing of value ; or,

3. Acts as an inspector of election at any such meeting and violates an oath taken by him, in pursuance of law as such inspector, or violates the provisions of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector ;

Is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 614. **Presumption of knowledge of corporate condition and business and of assent thereto by directors; definition.**—It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation is a foreign corporation, if it, carries on business or keeps an office therefor in this state.

The term “director” as used in this chapter includes any of the persons having, by law, the direction or management of the affairs of a corporation, by whatever name described.

A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record or minutes. [*As amended; in effect May 18, 1892.*]

§ 607. Repealed in 1884.

§ 608. Repealed in 1884.

§ 609. **Directors of corporation presumed to have knowledge of its affairs.**—A director of a corporation or joint-stock association must be deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors, is a violation of this chapter.

§ 610. **Director present at meeting, when presumed to have assented to proceedings.**—A director of a corporation, or joint-stock association, who is present at a meeting of the directors, at which any act, proceeding or omission of such directors in violation of this chapter occurs, must be deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.

§ 611. **Director absent from meeting, when presumed to have assented to proceedings.**—A director of a corporation, or joint-stock association, although not present at a meeting of the directors, at which any act, proceeding or omission of such directors, in violation of this chapter, occurs, must be deemed to have concurred therein, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, without causing, or in writing requiring, his dissent from such illegality to be entered in the minutes of the directory.

§ 612. **Failure of director upon whom application is served, etc.**—A director, trustee or other officer of a joint-stock association or corporation, upon whom a notice of application for an injunction affecting the property or business of such joint-stock association or corporation is served, who omits to disclose to the other directors, officers, or managers thereof, the fact of such service, and the time and place of such application, is guilty of a misdemeanor.

§ 613. **Foreign corporations.** — It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation was one created by the laws of another state, government or country, if it carried on business, or kept an office therefor, within this state.

§ 614. **"Director" defined.** — The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or are known in law.

CHAPTER XII.

FRAUDS IN THE SALE OF PASSAGE TICKETS.

SECTION 615. Sale of passage tickets on vessels and railroads forbidden, except by agents specially authorized.

616. Sales by authorized agents, restricted.

617. Unauthorized persons forbidden to sell certificates, receipts, etc., for the purpose of procuring tickets.

618. Punishment for violation of the preceding sections.

619. Conspiring to sell passage tickets in violation of law.

620. Conspirators may be indicted, notwithstanding object of conspiracy has not been accomplished.

621. Offices kept for unlawful sale of passage tickets declared disorderly houses.

622. Owners, pursers, etc., allowed to sell tickets.

623. Station masters, conductors, etc., allowed to sell tickets.

624. What must be stated in passage tickets.

625. Sale of tickets not filled out as required in last section, a misdemeanor.

626. Certain sales and exchanges of passenger tickets.

627. "Company" defined.

§ 615. Repealed in 1882.

In *Pennsylvania* it is held that a statute prohibiting the sale of railroad tickets except by the agents of the companies is constitutional. *Com. v. Wilson*, 14 Phila. 384.

§ 616. **Sale by authorized agents, restricted.** — No person except as allowed in section six hundred and twenty-two, shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for

the procurement of any ticket or instrument, giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or state-room on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell or offer to sell any such ticket, instrument, berth or state-room, or ask, take or receive any consideration for any such passage, conveyance, berth or state-room, excepting at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. But a person who shall have purchased a ticket in good faith for his own passage, and shall have been prevented from using the same, may sell the ticket at any price not greater than the regular rate established therefor, to another person in good faith, for his own use.

§ 617. Unauthorized persons forbidden to sell certificates, receipts, etc., for the purpose of procuring tickets.—No person other than an agent appointed, as provided in section six hundred and fifteen, shall sell, or offer to sell, or in any way attempt to dispose of any order, certificate, receipt or other instrument, for the purpose, or under the pretense, of procuring any ticket or instrument mentioned in section six hundred and fifteen, upon any company or line, vessel or railway train therein mentioned. And every such order sold or offered for sale by any such agent, must be directed to the company, owners or consignees at their office.

§ 618. Punishment for violation of the preceding sections.—A person guilty of a violation of any of the provisions of the preceding sections of this chapter is punishable by imprisonment in a state prison not exceeding two years, or imprisonment in a county jail not exceeding six months: [*Amended; in effect May 17, 1892.*]

§ 619. Conspiring to sell passage tickets in violation of law.—All persons who conspire together to sell or attempt to sell, to any person, any passage ticket, or other instrument mentioned in sections six hundred and fifteen and six hundred and

sixteen, in violation of those sections, and all persons, who, by means of any such conspiracy, obtain, or attempt to obtain any money or other property, under the pretense of procuring or securing any passage or right of passage in violation of this chapter, are punishable by imprisonment in a state prison not exceeding five years.

§ 620. **Conspirators may be indicted, notwithstanding object of conspiracy has not been accomplished.**— Persons guilty of violating the last section may be indicted and convicted for a conspiracy, though the object of such conspiracy has not been executed.

§ 621. **Offices kept for unlawful sale of passage tickets, declared disorderly houses.**— All offices kept for the purpose of selling passage tickets in violation of any of the provisions of this chapter, and all offices where any such sale is made, are deemed disorderly houses; and all persons keeping any such office, and all persons associating together for the purpose of violating any of the provisions of this chapter, are punishable by imprisonment in a county jail for a period not exceeding six months. [*Amended; in effect May 17, 1892.*]

§ 622. **Owners, pursers, etc., allowed to sell tickets.**— The provisions of this chapter do not prevent the actual owners or consignees of any vessel, from selling passage tickets thereon; nor do they prevent the purser or clerk of any vessel from selling in his office on board of such vessel, any passage tickets upon such vessel.

§ 623. **Station masters, conductors, etc., allowed to sell tickets.**— The provisions of this chapter do not prevent the station master or other ticket agent upon any railway, from selling in his office at any station on such railway, any passage tickets upon such railway; nor do they prevent any conductor upon a railway from selling such tickets upon the trains of such railway.

§ 624. **What must be stated in passage tickets.**— A ticket or instrument issued as evidence of a right of passage upon the high seas, from any port in this state to any port of any other state or nation, and every certificate or order issued for the

purpose, or under pretense of procuring any such ticket or instrument, and every receipt for money paid for such ticket or instrument must state the name of the vessel on board of which the passage is to be made, the name of the owners or consignees of such vessel, the name of the company, or line, if any, to which such vessel belongs, the place from which such passage is to commence, the place where such passage is to terminate, the day of the month and year upon which the voyage is to commence, the name of the person or persons purchasing such ticket or instrument, or receiving such order, certificate or receipt, and the amount paid therefor; and such ticket or instrument, order, certificate or receipt, unless sold or issued by the owners or consignees of such vessel, must be signed by their authorized agent.

An indictment under this statute must state the port or place from which the ticket purports to entitle the person to a passage. *Enright v. People*, 21 How. Pr. 383.

§ 625. Sale of tickets not filled out as required in last section, a misdemeanor.— A person who issues, sells or delivers to another, any ticket, instrument, certificate, order or receipt, which is not made or filled out as prescribed in the last section, is guilty of a misdemeanor.

§ 626. Certain sales and exchanges of passenger tickets.
A person who,

1. Sells, or causes to be sold, a passage ticket, or order for such ticket, on any railway, vehicle or vessel, to any emigrant passenger at a higher rate than one and a-quarter cents per mile; or,

2. Takes payment for any such ticket or order for a ticket under a false representation as to the class of the ticket, whether emigrant or first-class; or,

3. Directly or indirectly, by means of false representations, purchases or receives from an emigrant passenger any such ticket; or,

4. Procures or solicits any such passenger having such a ticket to exchange the same for another passenger ticket, or to sell the same and purchase some other passenger ticket; or,

5. Solicits or books any passenger arriving at the port of New York from a foreign country before such passenger has left the vessel on which he has arrived, or enters or goes on board any vessel arriving at the port of New York from a foreign country,

having emigrant passengers on board, for the purpose of soliciting or booking such passengers; and a person or agent of a corporation employing any person for the purpose of booking such passengers before leaving the ship;

Is guilty of a misdemeanor.

§ 627. "**Company**" defined.—The term "company," as used in this chapter, includes all corporations, whether created under the laws of this state or of the United States, or those of any other state or nation.

"Company" includes individuals as well as corporations. *Chicago Dock Co. v. Garrity*, 115 Ill. 164.

CHAPTER XIII.

FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE.

SECTION 628. By pipe-line corporations.

629. Issuing fictitious bills of lading, receipts and vouchers.

630. Erroneous bills of lading or receipts, issued in good faith, excepted.

631. Duplicate receipts must be marked "duplicate."

632. Selling, hypothecating or pledging property received for transportation or storage.

633. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.

634. Property demanded by process of law.

§ 628. **By pipe-line corporations.**—A pipe-line corporation, or a person being the officer, agent, manager or representative thereof, who:

1. Accepts, makes or issues any receipt, certificate or order of any kind for any commodity, unless the commodity represented is actually at the time in the possession of the corporation; or,

2. Delivers to any person any petroleum or other commodity received for transportation by such corporation without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same; or,

3. Having parted with the possession of any commodity and having received therefor an order, voucher, receipt or certificate shall reissue the same, or shall not cause it to be canceled by the word "canceled" stamped or printed legibly across the face thereof, and to be filed and recorded by such corporation, as provided by law;

Is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

§ 629. Issuing fictitious bills of lading, receipts and vouchers.—A person who :

1. Being the master, owner or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless the same has been so shipped or delivered and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher ; or ;

2. Carrying on the business of a warehouseman, wharfinger or other depository of property, who issues any receipt, bill of lading or other voucher for merchandise of any kind which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness ;

Is guilty of a misdemeanor, punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [*As amended ; in effect May 18, 1892.*]

“ Warehouseman ” is one who receives and stores goods as a business for a compensation or profit. Anderson's Law Dict. 1102.

“ Wharfinger ” is one who keeps a wharf for receiving goods for hire. Id. 1112.

§ 630. Erroneous bills of lading or receipts, issued in good faith, excepted.—No person can be convicted of an offense under the last two sections, for the reason that the contents of any barrel, box, case, cask or other vessel or package mentioned in the bill of lading, receipt or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels or brands were untrue.

§ 631. Duplicate receipts must be marked “ duplicate.”—A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while a former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word “ duplicate,” in a plain and legible manner, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 632. **Selling, hypothecating or pledging property received for transportation or storage.**—A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who sells or pledges any merchandise for which a bill of lading, receipt or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 633. **Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.**—A person mentioned in section three hundred and twenty-nine, who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words "not negotiable," plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 634. **Property demanded by process of law.**—The last two sections do not apply to any case where property is demanded by virtue of legal process.

See *Zachrisson v. Ahman*, 2 Sandf. 68. *Keyser v. Harbeck*, 3 Duer, 373.

CHAPTER XIV.

MALICIOUS MISCHIEFS AND OTHER INJURIES TO PROPERTY.

SECTION 635. Injuries to railroad tracks, etc.

636. Damaging building, etc., by explosion.

637. Burning certain property, how punished.

638. Altering, etc., signal or light for vessel, etc.

639. Injuring highway boundary, pier, sea wall, dock, lock, buoy, landmark, mile board pipe, main, sewer, machine, telegraph, poisoning well, etc.

640. Malicious injury and destruction of property.

640a. Trespasses on Indian land.

640b. Trespasses on Onondaga reservation.

640c. Cutting ice in front of premises of another.

641. Divulging, etc., telegram, a misdemeanor.

642. Opening or publishing a sealed letter, etc.

643. Affixing advertisement to another's laud, etc., how punished.

644. Presumptive evidence against certain persons.

645. Endangering life by maliciously placing explosive near building.

646. Malicious injury to standing crops, when a misdemeanor.

647. Removal of books and works of art from library; willful injury to works of art, etc.

648. Malicious injury to certain articles in museum, etc., how punished.

649. Destroying or delay of election returns.

650. Property in house of worship, etc.

651. Unlawful interference with gas meter.

652. Driving vehicle, etc., on sidewalks.

653. Coercing another person a misdemeanor.

654. Injury to other property, how punished.

§ 635. **Injuries to railroad tracks, etc.**—A person who,

1. Displaces, removes, injures or destroys any rail, sleeper, switch, bridge, viaduct, culvert, embankment or structure, or any part thereof, attached, appertaining to or connected with any railway, whether operated by steam, horses, or other motive power; or,

2. Places any obstruction upon the track of any such railway; or,

3. Willfully destroys or breaks any guard erected or maintained by a railroad corporation as a warning signal for the protection of its employees; or,

4. Willfully discharges a loaded firearm, or projects or throws a stone or other missile at a railway train, or at a locomotive, car or vehicle standing or moving upon a railway; or,

5. Willfully displaces, removes, cuts, injures or destroys any wire, insulator, pole, dynamo, motor, locomotive, or any part thereof, attached, appertaining to or connected with any railway operated by electricity, or willfully interferes with, or interrupts any motive power used in running such road, or willfully places any such obstruction upon the track of such railroad, or willfully discharges a loaded firearm, or projects or throws a stone, or any other missile, at such railway train, or locomotive, car or vehicle, standing or moving upon such railway; is punishable as follows:

1. If thereby the safety of any person is endangered, by imprisonment for not more than ten years.

2. In every other case, by imprisonment for not more than three years, or by a fine of not more than two hundred and fifty dollars, or both. [*As amended; in effect May 16, 1892.*]

Not necessary that engine or carriage be actually stopped or impeded by such obstruction. *State v. Kilty*, 28 Minn. 421.

§ 636. **Damaging building, etc., by explosion.**—A person who unlawfully and maliciously, by the explosion of gunpowder, or any other explosive substance, destroys or damages any building or vessel, is punishable as follows:

1. If thereby the life or safety of a human being is endangered, by imprisonment for not more than ten years;

2. In every other case by imprisonment for not more than five years.

See § 201, *ante*; § 645, *post*.

§ 637. Burning certain property, how punished.— A person who willfully burns or sets fire to any grain, grass, or growing crop, or standing timber, or to any building, fixtures or appurtenances to real property of another, under circumstances not amounting to arson in any of its degrees, is punishable by imprisonment for not more than four years

See § 486, *ante*.

§ 638. Altering, etc., signal or light for vessel, etc.— A person who, with intent to bring a vessel, railway engine, or railway train into danger, either,

1. Unlawfully or wrongfully shows, masks, extinguishes, alters, or removes a light or other signal; or,
2. Exhibits any false light or signal;

Is punishable by imprisonment for not more than ten years.

§ 639. Injuring highway boundary, pier, sea wall, dock, lock, buoy, landmark, mile board, pipe, main, sewer, machine, telegraph, etc.— A person who willfully or maliciously displaces, removes, injures or destroys,

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way; or,
2. A pier, boom, or dam, lawfully erected or maintained upon any water within the state, or hoists any gate in or about such dam; or,
3. A pile, or other material, fixed in the ground and used for securing any sea-bank or sea-walls, or the bank or dam of any river or other water, or any dock, quay, jetty, or lock; or,
4. A buoy or beacon, lawfully placed in any waters within the state; or,
5. A tree, rock, post, or other monument, which has been either erected or marked for the purpose of designating a point in the boundary of the state, or of a county, city, town, or village, or of a farm, tract or lot of land, or any mark or inscription thereon; or,
6. A mile-board, mile-stone, or guide-post, erected upon a highway, or any inscription upon the same; or,
7. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or who shall unlawfully and willfully cut, break,

tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall willfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state, of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; or,

8. A pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenance or appendage connected therewith; or,

9. A sewer or drain, or a pipe or main connected therewith, or forming a part thereof; or who,

10. Destroys or damages with intent to destroy or render useless any engine, machine, tool or implement intended for use in trade or husbandry;

Is punishable by imprisonment for not more than two years.

[*Subd. 7 as amended; in effect May 16, 1892.*]

§ 640. **Malicious injury and destruction of property.**

—A person who willfully:

1. Cuts down, destroys or injures any wood or timber standing or growing, or which has been cut down and is lying on lands of another, or of the people of the state; or,

2. Cuts down, girdles or otherwise injures a fruit, shade or ornamental tree standing on the lands of another, or of the people of the state; or,

3. Severs from the freehold of another, or of the people of the state, any produce thereof, or anything attached thereto; or,

4. Digs, takes or carries away without lawful authority or consent from any lot of land in any city or incorporated village, or from any lands included within the limits of a street or avenue laid down on the map of such city or village, or otherwise recognized or established, any earth, soil or stone; or,

5. Enters without the consent of the owner or occupant any orchard, fruit garden, vineyard or ground whereon is cultivated any fruit, with intent to take, injure or destroy anything there growing or grown; or,

6. Cuts down, destroys, or in any way injures any shrub, tree or vine being or growing within any such orchard, garden, vine-

yard, or upon any such ground, or any building, frame work or erection thereon; or,

7. Maliciously injures any ice upon any waters from which ice is taken as an article of merchandise, with intent to injure the owner thereof, or enters or skates upon any pond or body of water not navigable, kept and used for the purpose of taking ice therefrom as an article of merchandise, and upon or adjoining which a notice has been placed in a conspicuous position forbidding such entry, and stating the purpose for which said body of water is kept or used, or puts or throws upon or into any such pond or body of water any stick, stone or other substance to the injury of the ice or water; or,

8. Unlawfully takes, or carries away, or interferes with, or disturbs by any means the oysters or other shell fish of another, legally planted upon the bed of any river, bay, sound or water; or removes, pulls up or destroys any stake designating or marking out the legally planted oyster bed of another; or,

9. Intrudes, or places any hovel, shanty or building upon, or within the limits of any lot or piece of land within any incorporated city or village, without the consent of the owner, or within the boundaries of any street or avenue within such city or village; or,

10. Kills, wounds or traps any bird, deer, squirrel, rabbit or other animal within the limits of any cemetery or public burying ground, or of any public park or pleasure ground, or removes the young of any such animal, or the eggs of any such bird, from any cemetery, park or pleasure ground, or exposes for sale, or knowingly buys or sells any bird or animal so killed or taken; or,

11. Drives or leads along a public highway a wild and dangerous animal, or a vehicle or engine propelled by steam, except upon a railroad, along a public highway, or causes or directs such animal, vehicle or engine to be so driven, led, or to be made to pass, unless a person of mature age shall precede such animal, vehicle or engine by at least one-eighth of a mile, carrying a red light, if in the night-time, and gives warning to all persons whom he meets traveling such highway, of the approach of such animal, vehicle or engine; or,

12. Takes or attempts to take, without the consent of the owner of any lake or pond, any fish from the waters thereof, provided such lake or pond is so situated that fish cannot pass thereinto from the waters of any other lake, pond or stream, either public or owned by other persons; or, without the consent of the owner of any such lake or pond, places therein any pisciverous fish or any poison or other substance injurious to the health of fish, or lets the waters out of any such lake or pond with intent to take fish therefrom or to harm fish therein;

13. Injures any arsenal or armory, or its fixtures, or any uniforms, arms or equipments, or other property therein deposited; or

14. Trespasses upon any range of a rifle association lawfully established and used by or in connection with the national guard of the state or any organization, division or district thereof, or who injures any target or other property situate thereon, or who willfully violates thereon any regulation established to maintain order, preserve property or prevent accidents upon such range, or removes, mutilates or destroys a battle flag, book, placard, relic or record deposited or kept in the state military bureau, is guilty of a misdemeanor.

Is punishable by imprisonment not exceeding six months, or by a fine not exceeding two hundred and fifty dollars, or both.

Subd. 11 amended 1892, ch. 692; took effect May 18, 1892.

Subd. 13 and 14 added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

The essence of the offense is the injury to or destruction of property; and any act, however wanton and dangerous, which does not result in such injury or destruction is not an act of malicious mischief. *Wait v. Green*, 5 Park. 185.

Subdiv. 8. To establish the offense it is simply necessary to show that the act was done intentionally without the consent of the owner and without right. *Anderson v. How*, 116 N. Y., 336.

§ 640a. **Trespasses on Indian lands.**—A person who cuts, removes, causes to be removed or aids or assists in removing from the Allegany, Cattaraugus, Tonawanda or Onondaga reservations any wood, trees, timber, bark or poles, except as authorized by law, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 640b. **Trespasses on Onondaga reservation.**—A person, other than an Onondaga Indian, who cuts or removes from the Onondaga reservation any tree, timber, wood, bark or poles; or an Indian who cuts for the purpose of sale or removal from such reservation, or who removes, causes to be removed or aids in the removal from such reservation of any tree, timber, wood, bark or poles, except on the written permission of a majority of the chiefs of the Onondaga tribe, particularly specifying the quantity and kind of trees, timber, wood, bark or poles to be cut or removed, is guilty of a misdemeanor.

Added Laws 1893, ch. 692; taken effect Oct. 1, 1893.

§ 640c. **Cutting ice in front of premises of another.**—A person who takes possession of or cuts ice in front of the lands of

another on any water except lakes, ponds, the Hudson and Mohawk rivers and the tide-waters of Rondout and Catskill creeks, between the center of such body of water and such lands, after the owner or occupant has posted in a conspicuous manner upon such lands near the banks of such waters a written or printed notice of his desire to cut ice in front of such lands; or

2. Trespasses upon or takes such ice or any part thereof for commercial purposes; or

3. Willfully removes any such notice; is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 641. Divulging, etc., telegram, a misdemeanor.—A person who, either,

1. Wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employe of a telegraph company; or

2. Being such clerk, operator, messenger or other employe, willfully divulges, to any but the persons for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuses or neglects duly to transmit or deliver the same;

Is punishable by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment.

§ 642. Opening or publishing a letter, etc.—A person who willfully and without authority, either,

1. Opens or reads, or causes to be opened or read, a sealed letter or telegram; or,

2. Publishes the whole or any portion of such a letter or telegram, knowing it to have been opened or read without authority; Is guilty of a misdemeanor.

See U. S. Rev. Stat., § 3892; *U. S. v. Hilbury*, 29 Fed. Rep. 705.

1. A bank draft in a sealed envelope is not a "sealed letter." *McCormack v. Perry*, 47 Hun, 71.

§ 643. Affixing advertisement to another's land, etc., how punished.—A person who places upon or affixes to, or causes or procures to be placed upon or affixed to, real property not his own, or a rock, tree, wall, fence, or other structure thereupon, without the consent of the owner, any words, characters, or device, as a notice of, or reference to, any article, business, exhibition, profession, matter or event, is punishable by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both.

§ 644. Presumptive evidence against certain persons.—

The placing or affixing of any words, characters, device or notice of any article, business, or other thing, to or upon any property or place specified in the last section, is presumptive evidence that the proprietor, vendor or exhibitor thereof caused or procured the same to be so placed or affixed.

§ 645. Endangering life by maliciously placing explosive near building.—A person who places in, upon, under, against or near to, any building, car, vessel or structure, gunpowder or any other explosive substance, with intent to destroy, throw down or injure the whole or any part thereof, under such circumstances, that, if the intent were accomplished, human life or safety would be endangered thereby, although no damage is done, is guilty of a felony.

§ 646. Malicious injury to standing crops, when a misdemeanor.—A person, who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which punishment is not otherwise prescribed by this Code, or by some other statute, is guilty of a misdemeanor.

§ 647. Removal of books and works of art from library; willful injury of works of art, ornamental trees, etc.—Any person who,

1. Removes or assists in removing any book, manuscript, map, print, coin, medal, painting or other literary article or work of art from the library building of any reference library company, except for its preservation or repair, or for the purpose of its deposit in some other building of the company, or, being a trustee or officer of such company, consents to the removal thereof; or, upon such removal refuses to permit the same to be restored; or,

2. Not being the owner thereof, and without lawful authority, willfully injures, disfigures, removes or destroys a gravestone, monument, work of art, or useful or ornamental improvement, or any shade tree or ornamental plant, whether situated upon private grounds or upon the street, road or sidewalk, cemetery or public park or place, or removes from any grave in a cemetery any flowers, memorials or other tokens of affection, or other thing connected with them, is guilty of a misdemeanor. [*As amended; in effect May 18, 1892.*]

See *People v. Richards*, 44 Hun, 283; 5 N. Y. Cr. Rep. 355.

§ 648. Malicious injury to certain articles in museum, etc., how punished.—A person who maliciously cuts, tears, defaces, disfigures, soils, obliterates, breaks or destroys, a book, map, chart, picture, engraving, statue, coin, model, apparatus, specimen, or other work of literature or object of art, or curiosity,

deposited in a public library, gallery, museum, collection, fair or exhibition, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

§ 649. **Destroying or delay of election returns.**—A messenger appointed by authority of law to receive and carry a report, certificate or certified copy of any statement relating to the result of any election, who willfully mutilates, tears, defaces, obliterates or destroys the same, or does any other act which prevents the delivery of it as required by law; and a person who takes away from such messenger any such report, certificate or certified copy, with intent to prevent its delivery, or who willfully does any injury or other act in this section specified, is punishable by imprisonment in a state prison not exceeding five years. [*Amended; in effect May 17, 1892.*]

This section is directed against misconduct of messengers in charge of election returns, appointed by authority of law, or those who interfere with such messengers, and the words "or who willfully does any injury or other act in this section specified," do not enlarge the scope of the section, or affect any person except those specified. The section should be so construed with section 94 as not to make a double crime of one act. Consequently, where the indictment, in addition to the count above referred to, contains a count under section 649, Penal Code, such latter count is demurrable where it fails to allege, (1) that the defendant was a supervisor; or, (2) that he was a messenger; or, (3) that he took the certificate from a messenger; or, (4) that the certificate was to have been used for any legal purpose, or that such use was prevented. *People v. Wise*, 3 N. Y. Cr. Rep. 303; 2 How. (N. S.) 92.

It seems that the common-law rule of pleading should apply, and that both counts of the indictment in such case are bad, where they fail to set out the document in words and figures, or fail to profess so to do; and an allegation "in the words and figures, and in substance following, to-wit," is insufficient. *People v. Wise*, 3 N. Y. Cr. Rep. 303; 2 How. (N. S.) 92.

§ 650. **Property in house of worship, etc.**—A person, who willfully and without authority, breaks, defaces or otherwise injures any house of religious worship, or any part thereof, or any appurtenances thereto, or any book, furniture, ornament, musical instrument, article of silver or plated ware, or other chattel kept therein for use in connection with religious worship, is guilty of felony.

Violations of this section are punishable under section 14, *ante*.

§ 651. **Unlawful interference with gas meters and steam valves.**—A person who willfully, with intent to injure or defraud:

1. Connects a tube, pipe or other instrument or contrivance, with a pipe used for conducting or supplying illuminating gas, fuel or natural gas, in such a manner as to supply such gas to any burner or orifice, where the same is or can be burned, or used, without passing through the meter or instrument provided for registering the quantity consumed; or

2. Obstructs, alters, injures or prevents the action of a meter or other instrument used to measure or register the quantity of illuminating fuel or natural gas consumed in a house or apartment, or at an orifice or burner or by a consumer or other person, or a

person other than a state inspector or deputy inspector of gas meters or an employe of the company owning any gas meter who willfully shall detach or disconnect such meter or make or report any test of or examine for the purpose of testing any such meter so detached or disconnected; or

3. In any manner whatever, changes, extends or alters, any service or other pipe, or attachment of any kind, connecting or through which, natural or artificial gas is furnished from the gas mains or pipes of any person, company or corporation, without first procuring from said person, company or corporation written permission to make such change, extension or alteration; or

4. Makes any connection or reconnection, with the gas mains or service pipes of any person, company or corporation furnishing to consumers natural or artificial gas or turns on or off, or in any manner interferes with any valve or stop cock or other appliances belonging to such person, company or corporation, and connected with its service or other pipes or enlarges the orifice of mixers, or uses natural gas for heating purposes except through mixers, without first procuring from such person, company or corporation, a written permit to turn on or off such stop cock or valve, or to make such connections or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stop cocks, or other appliances of such person, company or corporation, as the case may be; or

5. Retains possession of, or refuses to deliver any mixer or mixers, or other appliances which may be, or may have been loaned or rented to them by any person, company or corporation, for the purpose of furnishing gas through the same, or who sells, loans, or in any manner disposes of the same to any person or persons, other than the said person, company or corporation entitled to the possession of the same; or

6. Sets on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person, company or corporation, in conveying gas to consumers, or interferes in any manner with the wells, pipes, mains, gate boxes, valves, stop cocks, or any other appliances, machinery or property of any person, company or corporation engaged in furnishing gas to consumers, unless employed by or acting under the authority and direction of such person, company or corporation ; or

7. Opens or causes to be opened, or reconnects, or causes to be reconnected, any valve lawfully closed or disconnected by a district steam corporation ; or

8. Turns on steam, or causes it to be turned on, or to re-enter any premises when the same has been lawfully stopped from entering such premises :

Is guilty of a misdemeanor.

In effect, as amended, Oct. 1, 1893; Laws 1893, ch. 692.

§ 652. **Driving vehicle, etc., on sidewalks.**—A person who willfully and without authority drives any team, vehicle, cattle, sheep, horse, swine, or other animal along upon a sidewalk is punishable by a fine of fifty dollars, or imprisonment in a county jail not exceeding thirty days, or by both.

§ 653. **Coercing another person, a misdemeanor.**—A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property, or threatens such violence or injury ; or,

2. Deprives any such person of any tool, implement, or clothing, or hinders him in the use thereof, or,

3. Uses or attempts the intimidation of such person by threats or force ;
Is guilty of a misdemeanor.

See § 168, *ante* ; § 673, *post* ; *People v. Lenhardt*, 4 N. Y. Cr. Rep. 326.

§ 654. **Injury to other property, how punished.**—A person who unlawfully and willfully destroys or injures any real or personal property of another or who without authority or permission from a person who has the right to give such authority or permission, loosens any brake or blocking of any car standing on any railroad track in this state, or without like authority or permission, puts upon or runs any hand car, or other car, on any railroad track in this state, or without like authority or permission, interferes or meddles with any brake or coupling of any car while standing or moving on any railroad track in this state, or takes any part therein, in a case where the punishment is not specially prescribed by statute, is punishable as follows :

1. If the value of the property destroyed, or the diminution in the value of the property by the injury is more than twenty-five dollars, by imprisonment for not more than four years;

2. In any other case, by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

3. And in addition to the punishment prescribed therefor, he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property, or the public officer having charge thereof. [*As amended; in effect Sept. 1, 1892.*]

See § 640, *ante*; *Von Hoffman v. Kendall*, 17 N. Y. Supp. 713.

The malicious killing of a horse is a misdemeanor. *People v. Woodward*, 81 Hun, 58; 2 N. Y. Cr. Rep. 37.

TITLE XVI.

CRUELTY TO ANIMALS.

SECTION 655. Overdriving animal; failing to provide proper sustenance.

656. Abandonment of disabled animal.

657. Failure to provide proper food and drink to impounded animal.

658. Selling or offering to sell or exposing disabled animal.

659. Carrying animal in a cruel manner a misdemeanor.

660. Animal wantonly poisoned, or attempted to be poisoned, a misdemeanor.

661. Throwing substance injurious to animals in public place a misdemeanor.

662. Keeping milch cows in unhealthy places, and feeding them with food producing unwholesome milk, a misdemeanor.

663. Transporting animals for more than twenty-four consecutive hours a misdemeanor.

664. Setting on foot fights between birds and animals a misdemeanor.

665. Keeping, etc., a place where animals are fought a misdemeanor.

666. Running horses on highway a misdemeanor.

667. Leaving state to elude provisions of this title.

668. Fines and penalties to be paid over to a society.

669. Definitions. /

§ 655. Overdriving animal; failing to provide proper sustenance. — A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary suste-

nance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor.

See Bish. Stat. Crimes (3d ed.), § 1102; 21 Alb. L. J. 265; 1 Am. and Eng. Encyc. of Law, 575; 20 Eng. Rep. 558, note; 12 Crim. Law Mag. 377.

At common law, cruelty to an animal merely upon the ground that it gave pain to the animal, and for the protection or for the sake of the animal, was not indictable. Although under certain circumstances acts of cruelty when publicly committed, to the annoyance of the public, or when committed with a malicious intent to injure the owner of the animal, might have been indictable at common law. *People v. Brunell*, 48 How. Pr. 435.

A cruel mode of slaughtering hogs is indictable under the law of 1866. *Davis v. Society*, 16 Abb. Pr. (N. S.) 73.

Dishorning cattle is "cruelty to animals." *Ford v. Wiley*, 28 Q. B. Div. 203; 40 Alb. L. J. 270. But see *Callaghan v. Society*, 16 Cox's Crim. Cas. 101; 37 Eng. Rep. 813.

The driver and conductor of a railroad car is indictable under the statute for overloading a city railway car, though acting under order from the company. *People v. Tinsdale*, 10 Abb. Pr. (N. S.) 374.

Whether or not car was overloaded is a question for the jury. *Id.*

Form of indictment for such an offense. *Id.*

Driving a horse in ignorance that it is sick or sore not an offense. *Broadway Stage Co. v. Am. Soc., etc.*, 15 Abb. Pr. (N. S.) 51.

An agent of the society can only arrest without a warrant when the offense is committed in his presence. *Id.*

What will amount to an indictable offense in overdriving a sick horse. *People v. Brunell*, 48 How. Pr. 435.

It is no crime to use a dog upon a treadmill or in any other serviceable employment if the party be not guilty of cruelty. *People v. Spec. Sess.*, 4 Hun, 441.

In prosecuting a man for shooting a dog the indictment must state that the shooting was malicious and needless. *Warren v. Perry*, 14 Hun, 337. See, also, *Ross' Case*, 3 C. H. Rec. 191; *Morris' Case*, 6 id. 62; *Lachine's Case*, 4 id. 26.

Cruelty to a brute cannot be justified, and in all cases the court will severely punish the offender. *People v. Stokes*, 1 Wheel. C. C. 111.

Under the law of 1867, an officer of the society for the prevention of cruelty, etc., duly appointed, can arrest an offender without warrant. *Davis v. Am. Society, etc.*, 75 N. Y. 362. See *Broadway Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51.

Whether or not a person is guilty under the law is a question for the jury. *Davis v. Society*, 75 N. Y. 362.

Shooting pigeons for sport is within the statute. *Paine v. Bergh*, 1 City Ct. Rep. 160.

§ 656. **Abandonment of disabled animal.**— A person being the owner or possessor, or having charge or custody of a maimed, diseased, disabled or infirm animal, who abandons such animal or leaves it to die in a street, road or public place, or who allows it to lie in a public street, road or public place, more than three hours after he receives notice that it is left disabled, is guilty of a misdemeanor. Any agent or officer of the American Society for the Prevention of Cruelty to Animals, or of any society duly incorporated for that purpose, may lawfully destroy or cause to be destroyed any animal found abandoned and not properly cared for, appearing in the judgment of two reputable citizens called by him to view the same in his presence, to be glandered, injured or diseased past recovery for any useful purpose. When any person arrested is, at the time of such arrest, in charge of any animal or of any vehicle drawn by or containing any animal, any agent of said society may take charge of such animal and of such vehicle and its contents, and deposit the same in a safe place of custody, or deliver the same into the possession of the police or sheriff of the county or place wherein such arrest was made, who shall thereupon assume the custody thereof; and all necessary expenses incurred in taking charge of such property shall be a charge thereon.

§ 657. **Failure to provide proper food and drink to impounded animals.**— A person who, having impounded or confined any animal, refuses or neglects to supply to such animal during its confinement a sufficient supply of good and wholesome air, food, shelter and water, is guilty of a misdemeanor.

§ 658. **Selling or offering to sell or exposing disabled animal.**— A person who willfully sells or offers to sell, uses, exposes, or causes or permits to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or other contagious or infectious disease dangerous to the life or health of human beings, or animals, or which is diseased

past recovery, or who refuses upon demand to deprive of life an animal affected with any such disease, is guilty of a misdemeanor.

This section is substantially a re-enactment of chap. 28, Laws 1878.

Of the clause "refuses upon demand to deprive of life," etc., it is said in 17 Alb. L. J. 177: "Of the constitutionality of this second section we doubt. So long as a person keeps animals affected with contagious diseases upon his own premises he is guilty of no invasion of the rights of others (*Fisher v. Clark*, 41 Barb. 329); nor can he be deprived of them 'without due process of law.' He is, of course, bound at his peril to keep them from harming others, and if he takes them into a public place, then the police power of the government may punish him for his disregard of the public weal. *Mills v. N. Y. & Harlem R. R. Co.*, 2 Rob. 236; *Barnum v. Van Dusen*, 16 Conn. 200; *Eaton v. Winne*, 20 Mich. 156; 4 Am. Rep. 877; *Mullett v. Mason*, L. R., 1 C. P. 559; *Fuller v. Wycoff*, 25 Ind. 321. At best it is a very curious piece of legislation. It threatens with severe punishment the omission to do an act which is required to be done in a contingency, about which there is liable to be differences of opinion."

§ 659. Carrying animal in a cruel manner, a misdemeanor.—A person who carries or causes to be carried in or upon any vessel or vehicle, or otherwise, any animal in a cruel or inhuman manner, or so as to produce torture, is guilty of a misdemeanor.

§ 660. Animal wantonly poisoned, or attempted to be poisoned, a misdemeanor.—A person who unjustifiably administers any poisonous or noxious drug or substance to an animal, or unjustifiably exposes any such drug or substance with intent that the same shall be taken by an animal, whether such animal be the property of himself or another, is guilty of a misdemeanor.

§ 661. Throwing substance injurious to animals in public places, a misdemeanor.—A person, who willfully throws, drops or places, or causes to be thrown, dropped or placed upon any road, highway, street or public place, any glass, nails, pieces of metal, or other substance which might wound, disable or injure any animal, is guilty of a misdemeanor.

See *People v. Sheridan*, 15 State Rep. 989.

§ 662. Keeping milch cows in unhealthy places and feeding them with food producing unwholesome milk, a misdemeanor.—A person who keeps a cow or any animal for

the production of milk, in a crowded or unhealthy place, or in a diseased condition, or feeds such cow or animal upon any food that produces impure or unwholesome milk, is punishable by a fine not less than fifty dollars, or imprisonment not exceeding one year, or by both.

§ 663. Transporting animals for more than twenty-four consecutive hours, a misdemeanor.— A railway corporation, or an owner, agent, consignee, or person in charge of any horses, sheep, cattle, or swine, in the course of, or for transportation, who confines, or causes or suffers the same to be confined, in cars for a longer period than twenty-four consecutive hours, without unloading for rest, water and feeding, during ten consecutive hours, unless prevented by storm or inevitable accident, is guilty of a misdemeanor. In estimating such confinement, the time during which the animals have been confined without rest, on connecting roads from which they are received, must be computed. If the owner, agent, consignee, or other person in charge of any such animals refuses or neglects upon demand to pay for the care or feed of the animals while so unloaded or rested, the railway company, or other carriers thereof, may charge the expense thereof to the owner or consignee and shall have a lien thereon for such expense.

See Hastings v. N. Y., etc., Ry. Co., 6 N. Y. Supp. 837.

§ 664. Setting on foot fights between birds and animals, a misdemeanor.— A person who sets on foot, instigates, promotes, or carries on, or does any act as assistant, umpire or principal, or is a witness of, or in any way aids in or engages in the furtherance of any fight between cocks or other birds, or dogs, bulls, bears, or other animals, premeditated by any person owning or having custody of such birds or animals, is guilty of a misdemeanor punishable by fine not less than ten dollars, nor more than one thousand dollars, or by imprisonment not less than ten days nor more than one year, or both.

§ 665. Keeping, etc., a place where animals are fought, a misdemeanor.— A person who keeps or uses, or is in any way connected with, or interested in the management of, or receives money for the admission of any person to, a house,

apartment, pit or place kept or used for baiting or fighting any bird or animal, and any owner or occupant of a house, apartment, pit or place, who willfully procures or permits the same to be used or occupied for such baiting or fighting, is guilty of a misdemeanor. Upon complaint under oath or affirmation to any magistrate authorized to issue warrants in criminal cases, that the complainant has just and reasonable cause to suspect that any of the provisions of law relating to or in any wise affecting animals are being or about to be violated in any particular building or place, such magistrate shall immediately issue and deliver a warrant to any person authorized by law to make arrests for such offenses, authorizing him to enter and search such building or place, and to arrest any person there present found violating any of said laws, and to bring such person before the nearest magistrate of competent jurisdiction, to be dealt with according to law.

"Bird or animal" includes "game-cocks." *People v. Klock*, 48 Hun, 275.

§ 666. Running horses on highway, a misdemeanor.—A person driving any vehicle upon any plank road, turnpike or public highway, who unjustifiably runs the horses drawing the same, or causes, or permits, them to run, is guilty of a misdemeanor.

See Code Crim. Proc., §§ 56, 57.

§ 667. Leaving state to elude provisions of this title.—A person who leaves this state with intent to elude any of the provisions of this title or to commit any act out of this state which is prohibited by them, or who, being a resident of this state, does not act without this state, pursuant to such intent, which would be punishable under such provisions, if committed within this state, is punishable in the same manner as if such act had been committed within this state.

§ 668. Fines and penalties to be paid over to certain societies.—All fines, penalties or forfeitures imposed or collected for a violation of the provisions of this title, or of any act for the prevention or punishment of cruelty to animals, now in force, or hereafter passed, must be paid on demand to the American Society for the Prevention of Cruelty to Animals; except where the prosecution shall be instituted or conducted by a society for the

prevention of cruelty to animals duly incorporated under the general laws of this state, in which case such fine, penalty or forfeiture must be paid on demand to such society. A constable or police officer must, and any agent or officer of any said societies may, arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this title. Any officer or agent of any of said societies may lawfully interfere to prevent the perpetration of any act of cruelty upon any animal in his presence. Any person who shall interfere with or obstruct any such officer or agent in the discharge of his duty shall be guilty of a misdemeanor. Any of said societies may prefer a complaint before any court, tribunal or magistrate having jurisdiction, for the violation of any law relating to or affecting animals, and may aid in presenting the law or facts before such court, tribunal or magistrate in any proceeding taken. The officers and agents of all duly incorporated societies for the prevention of cruelty to animals or children are hereby declared to be peace officers within the provisions of section one hundred and fifty-four of the Code of Criminal Procedure.

See *American Society, etc. v. Cohoes*, 4 State Rep. 808; 25 Week. Dig. 229.

§ 669. **Definitions.**—1. The word “animal,” as used in this title, does not include the human race, but includes every other living creature;

2. The words “torture” or “cruelty” includes every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted;

3. The words “impure and unwholesome milk” include all milk obtained from animals in a diseased or unhealthy condition, or who are fed on distillery waste, usually called “swill” or upon any substance in a state of putrefaction or fermentation.

1. Under a similar statute in Massachusetts it has been held that the word “animal” must be held to include wild and noxious animals (in that case a fox), unless the purpose of the statute or the context indicate a limited meaning. *Com. v. Turner*, 145 Mass. 300.

“Game-cock” is an “animal.” *People v. Klock*, 48 Hun, 278.

“Duck.” *Reg. v. Brown*, 24 Q. B. Div. 357; 41 Alb. L. J. 425.

Subdiv. 3. See *People v. Cipperly*, 37 Hun, 320; 101 N. Y. 634.

TITLE XVII.

OF MISCELLANEOUS CRIMES.

SECTION 670. Attorneys forbidden to defend criminal prosecution carried on by their partners, or formerly by themselves.

671. Attorneys may defend themselves.

672. Fraudulently presenting bills or claims to public officers for payment.

673. Endangering life by refusal to labor.

674. Publishing false messages.

674a. Unauthorized wearing badge of loyal legion.

675. Acts not expressly forbidden.

676. Acts committed out of the state.

§ 670. Attorneys forbidden to defend criminal prosecutions carried on by their partners, or formerly by themselves. — An attorney, who directly or indirectly advises in relation to, or aids or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by a person as district attorney or other public prosecutor, with whom such attorney is directly or indirectly connected as a partner; or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise; or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a misdemeanor.

§ 671. Attorneys may defend themselves. — The last section does not affect sections seventy-eight, seventy-nine, eighty and eighty-one of the Code of Civil Procedure, and does not prohibit an attorney from defending himself in person, as attorney or as counsel, when prosecuted either civilly or criminally.

§ 672. Fraudulently presenting bills or claims to public officers for payment. — A person who, knowingly, with intent to defraud, presents, for audit, or allowance, or for payment, to any officer or board of officers of the state, or of any county, town, city or village, authorized to audit, or allow, or to pay bills,

claims or charges, any false or fraudulent claim, bill, account, writing or voucher, or any bill, account or demand, containing false or fraudulent charges, items or claims, is guilty of a felony.

See §§ 165, 166, *ante*; *O'Reilly v. People*, 86 N. Y. 154; 40 Am. Rep. 525; 24 Alb. L. J. 312.

An attempt on the part of a public official to obtain money wrongfully by presenting a false bill to the county is within the statute. *People v. Bragle*, 10 Abb. N. C. 300.

As to character of evidence allowed to make out case, see *People v. Bragle*, 88 N. Y. 585; 68 How. Pr. 143.

§ 673. **Endangering life by refusal to labor.** — A person who willfully and maliciously, either alone or in combination with others, breaks a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, is guilty of a misdemeanor.

See §§ 168, 170, 653, *ante*.

§ 674. **Publishing false messages.** — A person who prints, publishes or circulates, as true, any message, order or proclamation purporting to be the message, order or proclamation of the executive of the United States or of this state, or of any other state of the United States now or hereafter admitted, or of any territory of the United States, knowing the same not to be genuine, is punishable by imprisonment in a state prison not exceeding five years, or by fine not exceeding one thousand dollars, or by both. An indictment for this offense may be found in any county in which the message, address or proclamation is printed, published or circulated, but not in more than one county of the state.

§ 674a. **Unauthorized wearing badge of loyal legion.** — Any person who willfully wears the insignia or rosette of the military order of the loyal legion of the United States or uses the same to obtain aid or assistance within this state, unless entitled to use or wear the same under the constitution and by-laws, rules and regulations of such order is guilty of a misdemeanor.

Added Laws 1893, ch. 692; takes effect Oct. 1, 1893.

§ 675. **Acts not expressly forbidden.** — Any person who shall by any offensive or disorderly act or language, annoy or interfere with any person or persons in any place or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language or display, although such act, conduct or display may not amount to an assault or battery, shall be deemed guilty of a misdemeanor. A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other

punishment is expressly prescribed by this code, is guilty of a misdemeanor; but nothing in this code contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered.*

See § 170, *ante*.

§ 676. **Acts committed out of the state.**—A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state, would be a crime, is punishable as if the act were committed within this state.

See § 16, *ante*; § 678, *post*; *People v. Lyon*, 99 N. Y. 219.

TITLE XVIII.

GENERAL PROVISIONS.

Section 677. When crimes punishable in different ways.

- 678. Acts punishable under foreign law.
- 679. Foreign conviction or acquittal.
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- 686. Attempts to commit crimes.
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* In effect September 1, 1891.

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719. Application of this Code to prior offenses.

720. Application of this Code to prior offenses.

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726. General repeal.

727. When act to take effect.

728. Repeal must be express.

§ 677. When crimes punishable in different ways.—An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision.

See Cooley Const. Lim. (5th ed.), *199; 4 Crim. Law Mag. 496, 498; 26 Alb. L. J. 324; *People, ex rel., v. Keeler*, 99 N. Y. 475; *Reg. v. Gilmore*, 15 Cox Crim. Cas. 85; 36 Eng. Rep. 500; *Mayor v. Hyatt*, 3 E. D. Smith, 156; *Rogers v. Jones*, 1 Wend. 261; *People v. Stevens*, 13 id. 341; *Blatchley v. Moser*, 15 id. 215.

A conviction for selling liquor without a license, upon proof of a sale on Sunday, is a bar to a prosecution for the same sale under an indictment charging a sale on Sunday. *People v. Krank*, 110 N. Y. 492.

There may be more crimes than one in a single transaction, and where the illegal act offends against two or more statutes a prosecution under any one of them is proper. *People v. Church*, 1 How. Pr. (N. S.) 366; citing 1 Bish. Crim. Law (7th ed.), 778; *Com. v. McConnell*, 11 Gray, 204; *Com. v. Trickey*, 13 Allen, 559.

A municipal government may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the state. *City of Brooklyn v. Toynbee*, 31 Barb. 282.

In *Polinsky v. People*, 11 Hun, 390; affirmed, 73 N. Y. 65, it was held that where a department of a city government is authorized by the legislature to

pass ordinances relating to some particular subject, such ordinances are not rendered void or inoperative by the fact that the acts forbidden by the ordinances are also forbidden by some general law applicable to the whole state.

Where the same act constitutes two distinct offenses, one against the state and the other against the municipality wherein it was committed, a conviction for the offense against the latter is no bar to an action by the state. *Hughes v. People*, 7 Crim. L. Mag. 280, 285, note; *Greenwood v. State*, 6 Baxt. 567; 33 Am. Rep. 539; *McRea v. Mayor*, 59 Ga. 168; 27 Am. Rep. 390; *State v. Lee*, 29 Minn. 445; *Waldo v. Wallace*, 12 Ind. 584; *Wragg v. Fenn. Township*, 94 Ill. 23; *Robbins v. People*, 95 id. 178; *State v. Williams*, 11 S. C. 292; *Howe v. Plainfield*, 8 Vroom, 150; *Mayor v. Allaire*, 14 Ala. 404; *State v. Hamilton*, 3 Tex. App. 643; *Shafer v. Mumma*, 17 Md. 331; *State v. Sly*, 4 Oreg. 278, 279; *State v. Bergman*, 6 id. 343; *Brownsville v. Cook*, 4 Neb. 105; *McLaughlin v. Stevens*, 2 Cranch C. C. 149.

In *Huffsmith v. People*, 8 Col. 175; 54 Am. Rep. 550, a general statute prohibited keeping open tippling-houses on Sunday. Subsequently a city charter gave the city "exclusive power to license, tax, restrain, prohibit and suppress tippling-houses" in the city. The city enacted an ordinance prohibiting the keeping open of any place for the sale of intoxicating liquors "between midnight and five o'clock, A. M., of the day following." The defendant was convicted under the statute of keeping open a tippling-house on Sunday in that city. *Held*, error.

§ 678. **Acts punishable under foreign laws.** — An act or omission declared punishable by this Code, is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in this Code.

See § 676, *ante*.

§ 679. **Foreign conviction or acquittal.** — Whenever it appears upon the trial of an indictment that the offense was committed in another state or country, or under such circumstances that the courts of the state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

See Code Crim. Proc., § 139.

§ 680. **Contempt, how punishable.** — A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

See § 143, *ante*; *People, ex rel. Sherwin, v. Mead*, 92 N. Y. 420; *Eagan v. Lynch*, 3 Civ. Proc. 236.

§ 681. Mitigation of punishment in certain cases.— Where it appears, at the time of passing sentence on a person convicted, that he has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court, passing sentence, may mitigate the punishment to be imposed, in its discretion.

See § 143, *ante*.

§ 682. Rule for punishment of accessory.— When an act or omission is declared by statute to be a misdemeanor, and no punishment for aiding or abetting in the doing thereof is expressly prescribed, every person who aids, or abets another in such act or omission is also guilty of a misdemeanor.

See § 31, *ante*.

§ 683. Sending letter; when deemed complete.— In the various cases, in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any post-office or other place, or delivered to any person, with intent that it shall be forwarded. And the party may be indicted and tried in any county wherein such letter is so deposited or delivered, or in which it is received by the person to whom it is addressed.

See §§ 235, 558, 559, *ante*.

§ 684. Omission to perform duty.— No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

See §§ 117, 154, *ante*.

§ 685. Attempts to commit crimes.— A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself.

This section must be limited to cases to which it can apply. *Darrow v. Family Fund Society*, 42 Hun, 247; affirmed, 116 N. Y. 537; 15 Am. St. 430.

It does not apply to an attempt to commit suicide. *Id*.

It is only applicable to a trial upon an indictment for an attempt to commit a crime, and not to a trial upon an indictment for the crime itself. *People v. Dartmore*, 48 Hun, 323; *People v. Sullivan*, 27 id. 38.

§ 686. **Attempts to commit crimes.** — A person who unsuccessfully attempts to commit a crime is indictable and punishable, unless otherwise specially prescribed by statute, as follows :

1. If the crime attempted is punishable by the death of the offender, or by imprisonment for life, the person convicted of the attempt is punishable by imprisonment for not more than ten years ;

2. In any other case he is punishable by imprisonment for not more than half of the longest term, or by a fine not more than one-half of the largest sum, prescribed upon a conviction for the commission of the offense attempted, or by both such fine and imprisonment.

See *People v. Johnson*, 110 N. Y. 141; *People v. Moran*, 123 id. 254.

§ 687. **Restrictions upon preceding sections.** — The last section does not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

§ 688. **Second offense.** — A person who, after having been convicted within this state of a felony, or an attempt to commit a felony, or of petty larceny, or, under the laws of any other state, government or country, of a crime which, if committed within this state, would be a felony, commits any crime within this state, is punishable, upon conviction of such second offense, as follows :

1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life ;

2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction.

In *People v. Price*, 58 Hun, 185; 119 N. Y. 650, it was held that there is no constitutional provision which prevents the legislature of this state from providing that where persons have been convicted of felony in another state,

whether subsequently pardoned or not, they shall, upon a subsequent conviction of felony in this state, be, by reason of such prior conviction, more severely punished for the latter offense.

In *People v. Caesar*, 1 Park. 648, Parker, J., said: "The legislature, without doubt, has the power to inflict an increased punishment where the first offense took place in a foreign country, as well as where it took place in our own state, not because it has, or can give to the courts any jurisdiction over offenses committed in a foreign state or country, but because it has full power over the offense committed here, and may mete out such punishment as the moral delinquency of the offender may seem to require. The first offense though committed beyond our jurisdiction may furnish a good reason for punishing the second offense committed within it, to an extent commensurate with the guilty character of the culprit, and sufficient to protect the community against further depredation."

Where a statute provides increased punishment for second and third offenses of burglary, robbery, etc., and a person indicted for robbery pleads not guilty, waives a jury, is convicted, sentenced, and serves out his term, he may subsequently be subjected to an increased punishment for a conviction of burglary, although the former conviction may have been erroneous on account of the waiver of the jury. *Kelly v. People*, 115 Ill. 583; 56 Am. Rep. 184.

A statute providing that a person shall be subjected to an increased punishment upon conviction for a second offense, is not a violation of a constitutional provision, that no person shall be twice put in jeopardy for the same offense. *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401; *Chetworth v. Com.* (Ky.), 12 Crim. L. Mag. 234.

A prior conviction, to be available in increasing punishment for a second offense, must be alleged in the indictment. *People v. Price*, 6 N. Y. Cr. Rep. 141; *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401.

And there must be proof of the identity of the accused as the defendant in the prior conviction. *People v. Price*, 6 N. Y. Cr. Rep. 141.

An offense will be deemed a first offense unless the contrary is charged. *People v. Cook*, 45 Hun, 37.

Requisites of indictment for second offense. *People v. Gibson*, 5 Hun, 542.

The court has no discretion as to the sentence to be imposed. *People v. Raymond*, 32 Hun, 123; 96 N. Y. 38.

§ 689. **Second offense.** — A person, who, having been convicted within this state of a misdemeanor, afterwards commits and is convicted of a felony, must be sentenced to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony.

§ 690. **Habitual criminals.** — Where a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state, of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times

convicted in this state of a misdemeanor, he may be adjudged by the court, in addition to any other punishment inflicted upon him to be an habitual criminal.

The act known as the "Habitual Criminal Act" (Laws 1873, chap. 357) is constitutional. *People v. McCarthy*, 45 How. Pr. 97.

See, also, 23 Am. L. Reg. (N. S.) 397, 402, note.

§ 691. Person, etc., of habitual criminal. — The person of an habitual criminal shall be at all times subject to the supervision of every judicial magistrate of the county, and of the supervisors and overseers of the poor of the town where the criminal may be found, to the same extent that a minor is subject to the control of his parent or guardian.

See Code Crim. Proc., § 514.

§ 692. Effect of pardon. — The governor may grant a pardon which shall relieve from judgment of habitual criminality as from any other sentence; but upon a subsequent conviction for felony of a person so pardoned, a judgment of habitual criminality may be again pronounced on account of the first conviction, notwithstanding such pardon.

See *People v. Price*, 53 Hun, 188.

§ 693. Woman concealing birth of issue. — A woman, who, having been convicted of endeavoring to conceal the still birth of any issue of her body, which, if born alive, would be a bastard, or the death of any such issue under the age of two years, subsequently to such conviction endeavors to conceal any such birth or death, is punishable by imprisonment in a state prison not exceeding five years, and not less than two years.

Must be sent to *penitentiary*, § 698 *post*.

§ 694. Imprisonment on two or more convictions. — Where a person is convicted of two or more offenses, before sentence has been pronounced upon him for either offense, the imprisonment, to which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

Applies only to separate convictions upon distinct trials. It does not apply to convictions upon the same trial of several offenses joined in one indictment. *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 560; 19 Am. Rep. 211.

This case was disapproved in *Eldridge v. State*, 37 Ohio St. 191; *Castro v. Queen*, 6 App. Cas. 229; 34 Eng. Rep. 399.

§ 695. Imprisonment on two or more convictions.—

Where a person, under sentence for a felony, afterward commits another felony, and is thereof committed and sentenced to another term of imprisonment, the latter term shall not begin until the expiration of all the terms of imprisonment, to which he is already sentenced.

See 1 Bish. Crim. Law (7th ed.), § 953; 29 Eng. Rep. 434; *Haggerty v. People*, 6 Lans. 347; 53 N. Y. 642.

In *Thomas v. People*, 67 N. Y. 218, the defendant at the time of his conviction for murder was under sentence for a term, several years of which were unexpired. *Held*, that this did not prevent his being sentenced to be hung before the expiration of his term.

§ 696. Convict, when sentenced for life.— When a crime is declared by statute to be punishable by imprisonment for not less than a specified number of years, and no limit of the duration of the imprisonment is declared, the court authorized to pronounce judgment upon conviction may, in its discretion, sentence the offender to imprisonment during his natural life, or for any number of years not less than the amount prescribed.

1. When a crime is declared by any of the provisions of this Code to be punishable by imprisonment for not more than a specified number of years, the court authorized to pronounce judgment upon conviction may, in its discretion, sentence the offender to imprisonment for any time less than that prescribed by the provisions of this act. [*Amended; in effect May 17, 1892.*]

§ 697. Sentences, how limited.— When a convict is to be sentenced to imprisonment in a state prison or a penitentiary, the court before which the conviction was had must limit the term of the sentence, having reference to the probability of the convict earning a reduction of his term for good behavior, as provided by chapter twenty-one of the laws of eighteen hundred and eighty-six, and assuming that such reduction will be earned, so that the sentence will expire during either of the following months: April, May, June, July, August, September and October.

But the provisions of this section shall not apply in the following cases:

1. Where the sentence is to be for the term of one year or less,

2. Where the term of imprisonment for the crime of which the convict was convicted absolutely fixes a single definite period of time.

3. Where a judgment of conviction has been affirmed upon an appeal, and it becomes necessary for the court to impose the same sentence as that originally imposed. The officers of every prison or penitentiary are hereby expressly prohibited from taking into their custody any convict sentenced in violation of the provisions of this section, and any convict so illegally sentenced shall be returned by the sheriff of the county where the conviction was held, to the court, to be re-sentenced in conformity to the provisions of this section. Provided, that if it shall appear to the officers of any prison or penitentiary at the time it is sought to incarcerate a convict therein, that the court which imposed the sentence has adjourned, then it shall be lawful for said officers to receive said convict and hold him in custody until he can be re-sentenced as herein provided, and the second or re-sentence shall be deemed to have begun on the date of the convict's reception under his first sentence. The officers of any prison or penitentiary shall, in the case of a convict so illegally sentenced to imprisonment therein, immediately notify the court of their action.

See Laws 1889, chap. 382, § 74; 42 Penn. St. 446; 49 Cal. 463; *People v. Trimble*, 60 Hun, 364.

§ 698. **Imprisonment of female convict.**—A female, convicted of a felony punishable by imprisonment, must be sentenced to imprisonment in a county penitentiary, instead of a state prison. If there is no penitentiary in the county in which she is convicted she must be sentenced to imprisonment in the nearest penitentiary.

But see § 693, *ante*.

§ 699. **Persons between the age of sixteen and twenty-one years.**—Where a person between the ages of sixteen and twenty-one years is convicted of a felony, or where the term of imprisonment of a male convict for a felony is fixed by the trial court at five years or less, the court may direct the convict to be imprisoned in a county penitentiary, instead of a state prison, if there is a county penitentiary within the judicial department in which the trial is had. [*Amended; in effect May 12, 1892.*]

§ 700. Persons between sixteen and thirty years.—

A male between the ages of sixteen and thirty, convicted of felony, who has not theretofore been convicted of a crime, punishable by imprisonment in a state prison, may, in the discretion of the trial court, be sentenced to imprisonment in the New York State Reformatory at Elmira, to be there confined under the provisions of law relating to that reformatory.

§ 701. House of refuge. — Where a person under the age of sixteen years is convicted of crime, the trial court may, instead of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in a house of refuge under the provisions of the statute relating thereto. Where the conviction is had and the sentence is inflicted in the first, second or third judicial district, the place of confinement must be the house of refuge established by the managers of the Society for the Reformation of Juvenile Delinquents in the city of New York; where the conviction is had and the sentence inflicted in any other district, the place of confinement must be in the Western House of Refuge for Juvenile Delinquents. But nothing in this section shall affect the provision contained in section seven hundred and thirteen.

"In the humanity which the law extends to persons of immature years, it was intended, after the conviction had been had and the liability incurred of imprisonment in the state prison, upon its being ascertained upon examination that the prisoner was under sixteen years of age, to interpose and ameliorate the punishment by incarceration in an institution reformatory in its character." *Park v. People*, 1 Lans. 263.

Laws 1865, chap. 172, § 5, regarding the sending of disorderly and vicious children under sixteen years of age to the House of Refuge, are not inconsistent with the Code of Criminal Procedure or the Penal Code, and are not repealed thereby. *Matter of Reilly*, 18 Weekly Dig. 515.

A prisoner under sixteen years of age, convicted of burglary, is liable to imprisonment in state's prison, but may after conviction be sentenced to House of Refuge. *Park v. People*, 1 Lans. 263.

This is fixed by statute and need not be specified in the commitment. The language "sent to the House of Refuge, there to be dealt with according to law," refers with sufficient certainty to the authority given by law to this institution, and that is, in express terms, to retain in its custody males until their majority, and females until the age of eighteen years. *People v. Degnon*, 6 Abb. Pr. (N. S.) 87; 54 Barb. 105.

§ 702. **Imprisonment in county jail.** — Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term less than one year, the imprisonment must be inflicted by confinement in the county jail, or place of confinement designated by law to be used as the jail of the county, except when otherwise specially prescribed by statute.

See *People v. Parr*, 4 N. Y. Cr. Rep. 546.

§ 703. **Imprisonment in county jail or state prison.** — Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or state prison. No person shall be sentenced to imprisonment in a state prison for less than one year.

See *People v. Kelly*, 97 N. Y. 212; 32 Hun, 540; 2 N. Y. Cr. Rep. 432; *People v. Parr*, 4 id. 546.

§ 704. **Imprisonment in state prison.** — Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a state prison. But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections six hundred and ninety-eight, six hundred and ninety-nine, seven hundred, and seven hundred and one.

See *People v. Dewey*, 33 State Rep'r, 427.

§ 705. **Place to be specified in sentence; removal.** — The place of the imprisonment must be specified in the judgment and sentence of the court. But convicts may be removed from one place of confinement to another, in a case, and by the authority, designated by statute.

See *Weed v. People*, 31 N. Y. 467; *Matter of Waterman*, 33 Fed. Rep. 29.

§ 706. **Limit of fine.** — Where, in this Code, or in any other statute making any crime punishable by a fine, the amount of the fine is not specified, a fine of not more than five hundred dollars may be imposed.

§ 707. **Forfeiture.** — A sentence of imprisonment in a state prison for any term less than for life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced.

See *Miller v. Finkle*, 1 Park. 874; *O'Brien v. Hagan*, 1 Duer, 664

Does not apply to a sentence of imprisonment in a county penitentiary. *Bowles v. Haberman*, 95 N. Y. 246.

§ 708. **Consequence of sentence.** — A person sentenced to imprisonment for life is thereafter deemed civilly dead.

See *Avery v. Everett*, 110 N. Y. 323.

§ 709. **Convict protected by law.** — A convict sentenced to imprisonment is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not sentenced or convicted.

§ 710. **Certain forfeiture abolished.** — A conviction of a person for any crime does not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeitures to the people of the state, in the nature of deodands, or in a case of suicide, or where a person flees from justice, are abolished.

See § 173, *ante*; Code Crim. Proc., § 819.

§ 711. **Convict voting.** — The prohibition to vote at an election, contained in any statute of the state, shall not apply to a person heretofore or hereafter convicted of any crime, who has been sentenced or committed therefor to one of the houses of refuge or other reformatories organized under the statutes of the state.

See *People v. Harrington*, 15 Abb. N. C. 163; 1 How. Pr. (N. S.) 37; 3 N. Y. Cr. Rep. 141.

§ 712. **Witness' testimony.** — The sections of this Code which declare that evidence obtained upon the examination of a person as a witness shall not be received against him in a criminal proceeding do not forbid such evidence being proved against such person upon any charge of perjury committed in such examination.

§ 713. **Sentence of minor.**— When a person under the age of sixteen is convicted of a crime, he may, in the discretion of the court, instead of being sentenced to fine or imprisonment, be placed in charge of any suitable person or institution willing to receive him, and be thereafter, until majority or for a shorter term, subjected to such discipline and control of the person or institution receiving him as a parent or guardian may lawfully exercise over a minor. A child under sixteen years of age committed for misdemeanor, under any provision of this code, must be committed to some reformatory, charitable or other institution authorized by law to receive and take charge of minors. And when any such child is committed to an institution it shall, when practicable, be committed to an institution governed by persons of the same religious faith as the parents of such child.

People v. Dickinson, 57 Hun, 312; 32 State Rep'r, 496.

§ 714. **Convict as witness.**— A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question.

See Code Civ. Proc., § 832; *People v. McGloin*, 91 N. Y. 241; 12 Abb. N. C. 172; 1 N. Y. Cr. Rep. 154; affirming 28 Hun, 155; 1 N. Y. Cr. Rep. 105; *People v. Rose*, 52 Hun, 37; *Moremus v. Crawford*, 51 id. 96; *People v. Parr*, 42 id. 316; 4 N. Y. Cr. Rep. 546; 5 id. 36; *People v. Chapleau*, 121 N. Y. 266; *Spiegel v. Hays*, 118 id. 660.

As to defendant as witness, see Code Crim. Proc., § 893, note.

An unconvicted perjurer is a competent witness. *People v. O'Neil*, 109 N. Y. 266; 48 Hun, 45; 5 N. Y. Cr. Rep. 331.

Evidence that a witness has been convicted of being drunk and disorderly is admissible as affecting his credibility. *People v. Burns*, 33 Hun, 296; 2 N. Y. Cr. Rep. 415.

Where on a trial for rape, the prisoner testifies in his own behalf, a record of his conviction of petit larceny is admissible as affecting his credit. *People v. Satterlee*, 5 Hun, 167.

On a trial for burglary it is incompetent to ask the prisoner on cross-examination if he had not been arrested for bigamy, as such evidence does not legitimately tend to impair his credibility. *People v. Crapo*, 76 N. Y. 288; 33 Am. Rep. 302.

On a trial of an indictment, the prisoner, who had testified for himself, was asked on cross-examination how many times he had been arrested. This was objected to as incompetent to affect his credibility, and as tending to degrade

him, and it was claimed by counsel that he was privileged from answering. The objection was overruled. *Held*, error. *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183.

In *People v. Johnson*, 57 Cal. 571, the court said: "Since the amendments of 1880 to the Penal Code, a defendant indicted for a felony, if he be a witness, may be asked the question whether he has previously been convicted of a felony, but such question only goes to the credibility of the witness. There is nothing in *People v. Brown*, 72 N. Y. 571, in conflict with the views here expressed. The question propounded to the defendant and considered by the court in that case was: 'How many times have you been arrested?' Whether the question had any bearing on the credibility of the witness was not determined, but the objection to it was sustained on another ground, which was distinctly taken, namely, that of privilege."

Upon the trial of an indictment for an assault where the defendant, as a witness in his own behalf, had given material testimony in conflict with that given on the part of the prosecution, *held*, that it was proper, within the discretion of the trial court, as bearing upon his credibility, to ask him, upon cross-examination, if he had not committed an assault upon another person. *People v. Irving*, 95 N. Y. 541. See, also, *People v. Casey*, 72 id. 393.

The fact of a conviction of a felony in another state does not render a witness incompetent, but goes only to his credibility. *People v. Noyes*, cited in 12 Hun, 234; *National Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Rep. 632, note. *Contra*, *State v. Foley*, 15 Nev. 64; 37 Am. Rep. 458.

The legislature may not restore the competency of a witness rendered incompetent by reason of conviction of felony. *State v. Grant*, 79 Mo. 113; 49 Am. Rep. 218.

§ 715. Husband and wife as witnesses. — The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage.

See *People v. Wentworth*, 4 N. Y. Cr. Rep. 210; *People v. Houghton*, 24 Hun, 501; *People v. Briggs*, 60 How. Pr. 31-36; *Wilke v. People*, 53 N. Y. 525; *People v. Wood*, 36 State Rep'r, 952.

A defendant's wife is a competent witness against him on his trial for murder. *People v. Petmecky*, 2 N. Y. Cr. Rep. 458; affirmed, 99 N. Y. 415, but on other grounds.

Letters from defendant to his wife are competent. *People v. Petmecky*, 2 N. Y. Cr. Rep. 458.

On the trial of a husband for murder, his wife, who was an eye-witness to the transaction in question, was excluded as a witness for the people upon objection by defendant's counsel. *Held*, that the jury had a right to infer that the evidence of the wife would have been unfavorable to defendant, and a submission to the jury of that question was not error. *People v. Hovey*, 29 Hun, 382.

§ 716. **Creditor of convict.**—A person injured by the commission of a felony, for which the offender is sentenced to imprisonment in state prison, is deemed the creditor of the offender, and of his estate after his death, within the provisions of the statutes relating thereto.

§ 717. **Damages, how ascertained.**—In a case specified in the last section, the damages sustained by the person injured by the felonious act, may be ascertained in an action brought for that purpose by him against the trustees of the estate of the offender, appointed under the provisions of the statutes, or the executor or administrator of the offender's estate.

§ 717a. **Misrepresenting circulation of newspaper.**—Every proprietor or publisher of any newspaper or periodical who shall willfully or knowingly misrepresent the circulation of such newspaper or periodical for the purpose of securing advertising or other patronage shall be deemed guilty of a misdemeanor.

Added Laws 1893, ch. 650; takes effect May 18, 1893.

§ 718. **Construction of terms.**—In construing this Code or an indictment or other pleading in a case provided for by this Code, the following rules must be observed, except when a contrary intent is plainly declared in the provision to be construed, or plainly apparent from the context thereof:

1. Each of the terms, "neglect," "negligence," "negligent" and "negligently," imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

2. Each of term "corrupt" and "corruptly" imports a wrongful desire to acquire or cause some pecuniary or other advantage to or by the person guilty of the act or omission referred to, or to some other person.

3. Each of the terms "malice" and "maliciously" imports an evil intent or wish or design to vex, annoy or injure another person, or to maltreat or injure an animal.

4. The term "knowingly" imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require a knowledge of the unlawfulness of the act or omission.

5. Where an intent to defraud constitutes a part of a crime, it is not necessary to aver or prove an intent to defraud any particular person.

6. The term "vessel" includes ships, steamers, canal boats and every boat or structure adapted to navigation or movement from place to place by water, either upon the ocean, lakes, rivers or artificial waterways.

7. The term "signature" includes any memorandum, mark or sign written with intent to authenticate any instrument or writing; or the subscription of any person thereto.

8. The term "writing" includes both printing and writing.

9-15. Repealed, 1892, chap. 677.

16. The terms "reputed house of prostitution or assignation," "house of prostitution," "house of ill-fame or assignation," "disorderly house," include all premises which by common fame or report are used for purposes of prostitution or assignation.

Subdiv. 1. See *People v. Buddensieck*, 108 N. Y. 487; 1 N. Y. State Rep. 450; *Moebus v. Herrmann*, 108 N. Y. 353; *Rosenplaenter v. Roessle*, 54 id. 268; *New York Guaranty Co. v. Gleason*, 53 How. Pr. 125; *Sherman v. Transportation Co.*, 62 Barb. 150.

Subdiv. 5. See § 721, *post*; *Huntington's Trial*, 86; *People v. D'Argencour*, 32 Hun, 178. This subdivision is constitutional. *People v. Martin*, 2 N. Y. Cr. Rep. 51.

Subdiv. 6. See *Crawford v. Collins*, 45 Barb. 269; 30 How. Pr. 398; *Tinken v. Stillwagon*, 1 City Ct. Rep. 390.

Includes a "dry dock." *Walsh v. N. Y. Dock Co.*, 8 Daly, 887; affirmed, 77 N. Y. 448.

§ 719. Application of this Code on prior offenses.—Nothing contained in any provision of this Code applies to an offense committed or other act done, at any time before the day when this Code takes effect. Such an offense must be punished according to, and such act must be governed by the provisions of law existing when it is done or committed, in the same manner as if this Code had not been passed; except that, whenever the punishment or penalty for an offense is mitigated by any provision of this Code, such provision may be applied to any sentence or judgment imposed for the offense after this Code takes effect. An offense specified in this Code, committed after the beginning of the day when this Code takes effect, must be punished according to the provisions of this Code, and not otherwise.

See § 2, *ante*, and notes; *People v. Keeler*, 33 Hun, 589, note; *People v. Ray-*

mond, 96 N. Y. 88; *People v. Keeler*, 99 id. 463; 3 N. Y. Cr. Rep. 354; *People v. McTumoney*, 30 Hun, 505; 13 Abb. N. C. 55; 1 N. Y. Cr. Rep. 437; 66 How. 74; *Matter of Hallenbeck*, 65 id. 501; *People v. Sadler*, 97 N. Y. 146; *People v. Jaehne*, 103 id. 198; *People v. Dowling*, 1 N. Y. Cr. Rep. 530; *Matter of Hoffman*, id. 484; *People v. Coffee*, 62 How. Pr. 445; *Matter of Walker*, id. 333.

§ 720. Application of this Code to prior offenses.—

The provisions of this Code are not to be deemed to affect any civil rights or remedies existing at the time when this Code takes effect, by virtue of the common law or of any provision of statute.

§ 721. Intent to defraud.—Whenever, by any of the provisions of this Code, an intent to defraud is required, in order to constitute an offense, it is sufficient if an intent appears to defraud any person, association or body politic or corporate, whatever.

Not necessary to aver or prove an intent to defraud any particular person.
§ 718, subd. 5.

§ 722. Civil remedies, preserved.—The omission to specify or affirm in this Code any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

See 1 Bish. Crim. Law (6th ed.), §§ 267-278; Cooley Torts, 86-88.

§ 723. Proceedings to impeach, etc., preserved.—The omission to specify or affirm in this Code any ground or forfeiture of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by

law to carry into effect such impeachment, removal, deposition or suspension.

§ 724. **Military punishments, etc., preserved.**— This Code does not affect any power conferred by law upon any court-martial or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officers, to impose or inflict punishment for a contempt; nor any provisions of the laws relating to apprentices, bastards, disorderly persons, Indians and vagrants, except so far as any provisions therein are inconsistent with this Code.

“Upon any public body.” See *People v. Keeler*, 99 N. Y. 475; 3 N. Y. Cr. Rep. 354.

“Disorderly persons.” See *Matter of McMahon*, 64 How. 285; 1 N. Y. Cr. Rep. 58; *Matter of Riley*, 31 Hun, 613.

§ 725. **Certain statutes continuing in force.**— Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code; except so far as they have been repealed or affected by subsequent laws:

1. All acts incorporating municipal corporations, and acts amending acts of incorporation, or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers and duties of such officers.

2. All acts relating to emigrants or other passengers in vessels coming from foreign countries, except as provided in section six hundred and twenty-six of this Code.

3. All acts for the punishment of intoxication or the suppression of intemperance or regulating the sale or disposition of intoxicating or spirituous liquors.

4. All acts defining and providing for the punishment of offenses and not defined and made punishable by this Code.

Subdiv. 1. To be construed as saving only those penal provisions of charter acts which are not covered by the provisions of the Penal Code. *People v. Jashne*, 103 N. Y. 198, 199; 4 N. Y. Cr. Rep. 478.

Subdiv. 3. *People v. Scheroc*, 1 N. Y. Cr. Rep. 371; *People v. Myers*, 2 id. 128; 95 N. Y. 223.

Subdiv. 4. The former statutes relating to the offense of disorderly conduct are now in force. *Matter of McMahon*, 64 How. Pr. 285; 1 N. Y. Cr. Rep. 58.

See, also, under this subdivision, *People v. Bernardo*, 1 N. Y. Cr. Rep. 245; *People v. Page*, 22 State Rep. 277; *Rockwood v. Oakfield*, 2 id. 331.

§ 726. **General repeal.**—All acts and parts of acts which are inconsistent with the provisions of this act are repealed, so far as they impose any punishment for crime, except as herein provided.

See 22 Daily Reg. 476; 23 id. 1069; *Matter of Hallenbeck*, 65 How. 401; *People v. McTamoney*, 30 Hun, 505; 13 Abb. N. C. 55; 1 N. Y. Cr. Rep. 437; *Matter of McMahon*, 64 How. 285; 1 N. Y. Cr. Rep. 58; *Rockwood v. Oldfield*, 2 N. Y. State Rep. 331; *People v. Jashne*, 103 N. Y. 182; *People v. Ronney*, 21 State Rep. 175; *People v. Keeler*, 99 N. Y. 463; *People v. Bernardo*, 1 N. Y. Cr. Rep. 247; *People v. Russell*, 3 id. 475.

§ 727. **When act to take effect.**—This act shall take effect on the first day of December, eighteen hundred and eighty-two. When construed in connection with other statutes it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code.

See *People v. Beckwith*, 108 N. Y. 72.

§ 728. **Repeal must be express.**—No provision of this Code, or any part thereof, shall be deemed repealed, altered or amended by the passage of any subsequent statute inconsistent

therewith, unless such statute shall explicitly refer thereto and directly repeal, alter or amend this Code accordingly.

The legislature cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes. *Mongeon v. People*, 55 N. Y. 618.

SUPPLEMENT TO THE PENAL CODE.

§ 2. A statute must never be given a retrospective effect, unless its language expressly requires it. *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *People ex rel. Pellis, v. Supervisors*, 65 N. Y. 805; *Bullock v. Town of Durham*, 64 Hun, 382.

This rule has little if any application in construing the organic law. *Matter of Oliver Lee's Bank*, 21 N. Y. 9.

§ 3. Under the laws of the United States, an infamous crime is one for which the statutes authorize the courts to award an infamous punishment. Its character for being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but on whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment.

Sentence of imprisonment, whether with or without hard labor, to a penitentiary, is an infamous punishment, and a crime which may be so punished is an infamous crime. *Matter of McCluskey*, 12 Cr. L. Mag. 310.

§ 5. For a definition of felonies, see note to *Crenshaw v. State*, 17 Am. Dec. 791-795; *People v. Dewey*, 33 N. Y. St. Rep. 427.

Every crime punishable by death or by imprisonment in the State penitentiary is a felony. *Smith v. State*, 33 Me. 48; 54 Am. Dec. 607; and this definition holds good, even though the same crime may also be punishable

merely by imprisonment in the county jail, or by imprisonment and fine. *Id.*

§ 9. An action in equity will not lie to determine the question of the guilt or innocence of one charged with an offense against the criminal law. *Kramer v. Police Department of New York*, 58 N. Y. Super. Ct. 492.

§ 11. *Beabe v. Supervisors, etc.*, 64 Hun, 380.

§ 16. One who steals goods in another State and sends them into this Commonwealth by an innocent agent, may be indicted here for larceny. *Com. v. White*, 128 Mass. 430; 25 Am. Rep. 116.

Penal laws have no extra territorial force. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Murphy v. English*, 64 How. Pr. 362; *Langdon v. New York, etc., R. Co.* (N. Y. Sup. Ct.), 8 Ry. & Corp. L. J. 406; 9 N. Y. Supp. 245.

§ 17. See notes under section 22 post.

§ 20. *People v. McElvaine*, 125 N. Y. 400.

§ 21. See 13 Crim. L. Mag. 28; 10 id. 641, 805; 12 id. 991; 46 Alb. L. J. 423.

In *Plake v. State*, 121 Ind. 433; 16 Am. St. Rep. 408, it was held that whether insanity exists or not, and what is its character and extent, is a question of fact to be determined by the jury from the evidence, and it is not the province of the court to instruct the jury as a matter of law that insanity is a physical disease.

On trial for murder defendant intro-

duced evidence that he was subject to fits of insanity caused by an injury received when a child. His wife then offered to testify that about a week before the homicide, she had told defendant that the deceased, who was her father, had recently committed rape on her. *Held*, that the evidence was admissible, for the purpose of showing that defendant killed deceased in a fit of insanity brought on by this information. *People v. Wood*, 125 N. Y. 596.

In *People v. Lawlor*, 188 N. Y. 398 it was held that proof of partial incipient insanity is not sufficient to require an acquittal, if there was still the ability to form a correct perception of the quality of the act, and to know that it was wrong.

In *People v. Foy*, 188 N. Y. 664, a trial for murder, the defense was insanity, and in answer to a request to charge that insanity produced by anger or jealousy, if it incapacitates the subject from knowing right from wrong, would be a defense, the court said: "If there is such a thing as insanity produced by jealousy, or revenge or wrath, genuine, I do not mean turbulence of passion produced by a desire for revenge, but if there is any genuine insanity produced by any cause, then so far as affecting the prisoner, it is the same as any other kind of insanity." The court added: "The heat of passion and feeling produced by motives of anger, hatred or revenge, is not insanity. The law holds the doer of the act under such conditions responsible for the crime." *Held*, no error.

In *State v. Alexander*, 80 S. C. 74; 14 Am. St. Rep. 879, it was held that where insanity is made a defense, the question whether the defense is sustained or not, depends upon the preponderance of evidence for or against; but the

state in such case need not establish sanity beyond all reasonable doubt.

It is not competent, in a murder case, where the defense is insanity, to ask an expert witness, whether, in his judgment, "based on all the testimony" and on "the whole case," he thinks the accused is sane or insane, as it would be impossible for the jury to determine on what facts the witness bases his opinion. Such error is not cured by proving by the witness that in answering the question he assumed the truth of the evidence given by defendant's witnesses, as it left all the evidence to the uncertainty of his memory, and allowed him to give such weight thereto as he should in his own mind determine. *People v. McElvaine*, 121 N. Y. 256: The court say: "The rule as to the conditions governing the formation of hypothetical questions to experts has frequently been discussed and illustrated in the reported cases in this court. It was said by Judge Andrews, in the case of *People v. Barber*, 115 N. Y. 491, that 'the opinion of medical experts, as to the sanity or insanity of the defendant, based upon the testimony in the case, assumed for the purpose of the examination to be true, was undoubtedly competent. So, in connection with their opinion, they could be permitted to state the reason upon which it was founded. * * * But inferences from facts proved are to be drawn and found by the jury, and cannot be proved as facts by the opinion of witnesses.' In *Reynolds v. Robinson*, 64 N. Y. 595, Judge Earl, in speaking of evidence attempted to be given under an hypothetical question says: 'In such a case it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses, and to take in such facts as he thinks their evidence has established, or as he can recollect and

carry in his mind, and thus form and express an opinion. His opinion may be obtained by stating to him an hypothetical case, taking in some or all of the facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with. So, too, it was said by Judge Miller, in *Guterman v. Steamship Co.*, 83 N. Y. 858, that it is not the province of an expert witness 'to draw inferences, or to take in such facts as he can recollect, and thus form an opinion.' In *Gregory v. Railroad Co.*, reported in 28 N. Y. St. Rep. 726; 8 N. Y. Supp. 525, the court say: 'An expert witness cannot be asked to give an opinion based upon what he has heard other witnesses testify. Such opinion must be based on an hypothetical question containing facts which are assumed to have been proven.' The case of *People v. Lake*, 12 N. Y. 858, is not an authority for appellant on the question under discussion. The court in that case did not concur in the opinion written, but placed their decision upon two propositions, one of which only bears upon the question here, and that was that 'the Court of Oyer and Terminer erred in permitting physicians, who did not hear all the evidence relating to the mental condition of the prisoner, to give opinions as to his sanity, founded on the portion heard by them.' The question was not mooted or decided whether, in case they had heard all of the evidence, they could give opinions based thereon; but it passed off solely upon the question whether a person, who had heard only a part of the evidence upon a trial, could give an opinion based upon the

portion of the evidence so heard by him. It is true that an implication may be drawn from the decision that if the witness had heard the whole evidence, he might properly have given his opinion; but that question was not in the case, and it falls far short of being an authority on the point. The case of *Sanchez v. People*, 22 N. Y. 150, is to a similar effect. Two opinions were delivered in that case, but neither of them secured the concurrence of the court. The decision was placed upon the decision in the *Hartung* case, *id.* 95, and had no reference to the question under consideration here. The case of *People v. Thurston*, 2 Parker, 49, was in the Supreme Court, and failed to secure the concurrence of the court in the grounds upon which it was decided. No rule was therefore legally formulated by the decision, but the inferences to be drawn from the opinions read are plainly opposed to the people's contention here. No other decisions from this State are cited, and we deem it unnecessary to discuss or consider the rules prevailing in other countries, in view of the reported decisions made in our own courts."

In *People v. McElvaine*, 125 N. Y. 596, defendant killed deceased in order to effect his escape from his house, which he had entered to burglarize. He also threatened to kill the wife and servant of deceased if they interfered with him. He was then nineteen years old, of a low order of intelligence, but possessing a rudimentary education. He had been married eleven days before he committed the crime, and had never been treated by his family as insane. His family and relatives testified to incidents in his youth upon which they based their opinion of his insanity, but the testimony of the medical experts for the

defense was to the effect that he knowingly committed the crime. *Held*, that the question of sanity was for the jury, and that their verdict of guilty would not be disturbed.

§ 22. See Abbott's Crim. Brief, 483; 42 Alb. L. J. 87; 18 Am. L. Reg. (N. S.) 153; 13 Am. St. Rep. 875; 8 L. R. A. 33; 12 Tex. App. 31; 83 N. C. 626; 31 Cent. L. J. 112; 48 Alb. L. J. 387; *People v. Fish*, 125 N. Y. 136; *State v. Shores*, 31 W. Va. 491; 18 Am. St. Rep. 886; *State v. Mowry*, 37 Kans. 369; 10 Crim. L. Mag. 23, 29, note.

In *O'Grady v. State* (Sup. Ct. Neb. March, 1893), it was held that intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree where the offense consists of several degrees. The court said: 'It will be observed that the instruction contains two propositions, viz.: That drunkenness is no excuse for crime, unless it produces actual insanity or loss of reason; and, second, that where the intoxication is voluntary, proof of intoxication cannot be considered to disprove intent. The rule as stated in the second part of the instruction, being without qualification, is too broad. While it is true that intoxication is not a justification or excuse for crime, it is also true that at the present time evidence of intoxication may be admitted to determine whether or not a crime has been committed, or, where it consists of several degrees, depending on the intent, the grade of the offense. *Cline v. State*, 43 Ohio St. 334, 335, which, in our view, states the law correctly, is as follows: 'Where a person having the

desire to do to another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of that class. The rule is well settled that intoxication is not a justification or an excuse for crime. To hold otherwise would be dangerous to, and subversive of, public welfare. But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed, or where a crime consisting of degrees has been committed, such evidence may be important in determining a degree. Thus an intoxicated person may have a counterfeit bank bill in his possession for a lawful purpose, and, intending to pay a genuine bill to another person, may by reason of such intoxication hand him the counterfeit bill. As intent, in such case, is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no crime was committed. *Pigman v. State*, 14 Ohio, 555. So where the offense charged embraces deliberation, premeditation, some specific intent or the like, evidence of intoxication may be important, and it has frequently been admitted. *Nichols v. State*, 8 Ohio St. 435; *Davis v. State*, 25 id. 369; *Lytle v. State*, 31 id. 196. The leading case (*Pigman v. State*) has been repeatedly cited with approval (*People v. Robinson*, 2 Park. Crim. 235; *People v. Harris*, 29 Cal. 678; *Roberts v. People*, 19 Mich. 401; *State v. Welch*, 21 Minn. 22; *Hopt v. People*, 104 U. S. 631; *State v. Johnson*, 40 Conn. 136), and no doubt the law upon the subject is correctly stated in that case, and the rule as there expressed is humane and just; but there is always danger that

undue weight will be attached to the fact of drunkenness where it is shown in a criminal case, and courts and juries should see that it is only used for the purpose above stated, and not as a cloak or justification for crime. See also, *U. S. v. Drew*, 5 Mason, 28; 1 Lead. Crim. Cas. (2d ed.) 131, note; *Reg. v. Davis*, 14 Cox Crim Cas. 536; 28 Moak Eng. Rep. 657; note *Lawson* *Iusan*. 533-768, where all the cases are collected relating to the admissibility and effect in criminal cases of proof of intoxication.' Drunkenness is not favored as a defense, and in *Johnson v. Phifer*, 6 Neb. 402, this court held that it could not relieve a party from a contract on the ground that he was drunk when it was entered into, unless his condition reached that degree which may be called 'excessive drunkenness,' where a party is utterly deprived of reason and understanding. This in our view is the true rule. As much as we may desire to discourage drunkenness, and deplorable as the habit of drinking, with its train of wrecks and ruin, may be, we must still recognize the frailty of human beings, and adapt the law to the actual condition of the party. In *Pigman v. State*, *supra*, it is said: 'The older writers regarded drunkenness as an aggravation of the offense, and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals. Yet every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effects of drink, which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in

sudden heat, in a moment of frenzy, when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so abhors as the cool, deliberate and settled purpose to do mischief. That is a quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, although to be punished, may to some extent be softened and set down to the infirmities of human nature. Hence — not regarding it as an aggravation—drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind, necessary to constitute murder in the first degree. The principle is undoubtedly right. So, on a charge of passing counterfeit money, if the person is so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight.' If he was so drunk as to be deprived of reason and understanding, that is a fact for the jury to consider with the other facts proved in determining the guilt or innocence of the accused."

§ 24. See 4 Am. & Eng. Ency. of

Law, 697; Schouler Dom. Rel. § 50; 2 Broom & Had. Com. (Wait's ed.) 349.

§ 26. 12 Crim. L. Mag. 288, 509, 608.

§ 28. See 45 Fed. Repr. 857.

§ 29. *People v. Bosworth*, 64 Hun, 74.

§ 79. *People v. Spencer*, 66 Hun, 149.

§ 94. *People v. Peck*, 138 N. Y. 386; 67 Hun, 569, 573.

§ 97. The defendant in a criminal case may show, before an interpreter enters on his duties, that the oath administered to him was not in a form binding on his conscience, and that there was such a form. *State v. Chyo Chiagh*, 92 Mo. 393.

§ 154. See *People v. Ryall*, 58 Hun, 235; 34 N. Y. State Rep'r, 204; *People v. Long Island R. Co.*, 134 N. Y. 506, affirming 58 Hun, 412.

§ 165. *Matter of Cortes*, 186 U. S. 330.

§ 168. See 24 Abb. N. C. 260, note; *People v. Snaith*, 32 N. Y. State Rep'r, 568; 57 Hun, 834; *State v. Setter*, 57 Conn. 461; 14 Am. St. Rep. 121; *Calgan v. Wilson*, 127 U. S. 540.

In *Casey v. Cincinnati, etc., Union*, 45 Fed. Rep'r, 135, it was held that a combination or a conspiracy by a trades-union to boycott a newspaper for refusing to unionize its office is unlawful, and will be restrained by a court of equity.

In *People v. Flack*, 125 N. Y. 324; it was held: (1) A conspiracy to do an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. (2) The question of intent must always be submitted to the jury. (3) The defendant may testify as to his intent.

In *People v. Kief*, 126 N. Y. 661, affirming 58 Hun, 837, the court say:

"If the guilt of one of the several defendants, who are jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the other defendants for the commission of the felonious act, evidence as to acts or statements of the others must be confined to such as were made or done at times when the proofs in the case permit of a belief that a conspiracy existed, and when, therefore, the acts or statements might have been in furtherance of the common design. Whatever might have been said or done by the several persons accused of conspiring to commit the crime before the time when, according to the evidence, the conspiracy was formed, or subsequent to the time when the conspiracy terminated by the accomplishment of the common purpose, or by abandonment, is inadmissible as evidence against the others." See 11 Am. St. Rep. 229, note.

§ 170. Does not affect right of employer to maintain an action to restrain persons mentioned in this section from persuading his employes to leave his service. *Reynolds v. Everett*, 67 Hun, 304.

§ 171. *Reynolds v. Everett*, 67 Hun, 304.

§ 173. *Meacham v. New York, etc., Ass'n*, 120 N. Y. 242.

§ 181. *People v. O'Neil*, 109 N. Y. 251.

§ 183. On a trial for murder evidence was admitted on the part of the prosecution that after the killing of the deceased the defendant in the same affray stabbed another person. *Held*, no error. *People v. Pallster*, 138 N. Y. 601.

§ 211. See *People v. Camp*, 66 Hun, 533.

A person is not guilty of kidnapping, under this section, where he in

duced another to go out of the State by false promises that he could obtain work, at a specified compensation, at a distant place, although he had reason to believe that such representations would not prove true. *People v. Fitzpatrick*, 57 Hun, 459; 8 N. Y. Cr. Rep. 81.

§ 217. As to effects of pleading guilty of attempt to commit when indicted for assault in the first degree, see *People v. O'Connell*, 35 N. Y. State Rep'r, 940.

On a prosecution for an attempt to commit an assault with a deadly weapon it appeared that defendant met a traveler in a road, and pointing a rifle toward him, commanded him to halt, saying to him, "Turn around quick, or I will blow your head off;" and "If you move another step forward I will blow your head off." It was not shown that the rifle was loaded. *Held*, that the fact that the rifle was not loaded was a matter of defense, and the court erred in ruling as a matter of law that it was not a deadly weapon. *State v. Herron*, 45 Alb. L. J. 493.

§ 218, subd. 5. *People v. Aldrich*, 33 N. Y. State Rep'r, 790.

§ 219. See *Matter of Bray*, 34 N. Y. State Rep'r, 642.

A complaint before a village police justice described the offense as "maliciously and unlawfully beating" the complainant, "by kicking him in the head, body and face without provocation. *Held*, that the name given to the offense was not material, and that the complaint was good and would support a conviction of assault in the third degree. *People v. Parker*, 69 Hun, 130.

§ 220. *People v. O'Connell*, 60 Hun, 109.

§ 222. See 28 Alb. L. J., 520.

§ 223, subd. 4. 31 Cent. L. J. 234; *Boyd v. State*, 88 Ala. 169; 16 Am.

St. Rep. 31; 12 Cr. L. Mag. 625; *Moak's Underhill Torts*, 219; 27 Am. L. Reg. (N. S.) 430.

§ 242. See *Clark v. Anderson*, 33 N. Y. State Rep'r, 866. In 15 Am. St. Rep. 333, will be found a note on newspaper libel.

A libel may be by mere speech, but such a form of libel is not indictable. *People v. Stark*, 35 N. Y. State Rep'r, 152; 59 Hun, 51.

§ 243. An indictment under this section must state the manner in which the publication was made. A mere allegation that the libel specified was published by defendant is not sufficient. *People v. Stark*, 35 N. Y. State Rep'r, 150; 59 Hun, 51.

In a criminal prosecution for libel it is error to exclude evidence on the part of the defendant tending to show that no malicious intent existed on his part, especially where the evidence tends to show a conspiracy between the complainant and another to cause the publication with a view to prosecute the defendant. *People v. Stark*, 35 N. Y. State Rep'r, 150; 59 Hun, 51.

§ 253. A communication to the governor of the State giving information for the purpose of influencing his action on a bill which has passed the Legislature is *prima facie* privileged; but if the communication contains defamatory matter and is unnecessarily published to others, such publication is not privileged. *Woods v. Wiman*, 122 N. Y. 445, reversing 47 Hun, 364.

§ 259. See 31 Am. L. Reg. N. S. 723.

§ 265. In *People v. Moses*, 65 Hun, 161; 8 N. Y. Cr. Rep. 396, defendant was charged with fishing on Sunday in a private lake where he was by permission of the owner, it did not appear that he created any disorder or that he disturbed the peace, or that his acts

were witnessed by any one except complainant. *Held*, properly convicted.

Playing baseball on Sunday comes within the definition of "sporting" and renders the persons engaged therein liable to punishment. *State v. O'Rourke* (Neb.) 46 Alb. L. J. 581.

§ 266. See *Hennersdorf v. State*, 8 Am. St. Rep. 449; *Dougan v. State*, 42 Alb. L. J. 367; 8 Ry. & Corp. L. J. 390.

§ 278. In *People v. Connor*, 37 N. Y. State Rep'r. 28, the evidence showed that defendant was a strong man of mature years, engaged in conducting an intelligence office; the prosecutrix was a girl, only a little over sixteen, who went to his office to obtain employment; that defendant suddenly assaulted her while they were alone together in his office; that she struggled to get away from the defendant, and continually requested him to release her, and that she did not cry out because she was too frightened to do so. *Held*, that the jury were justified in finding that she resisted to the extent of her ability.

§ 282. Upon the trial of an indictment for taking, harboring and receiving for the purpose of sexual intercourse a female not the wife of the defendant and under sixteen, it was shown that the female was brought by defendant from another State. The prosecution showed that the defendant had been intimate with the female in said State. *Held*, that such evidence was competent as characterizing the relations existing between them and as bearing upon the purpose for which defendant brought the female into this State. *People v. Wah Lee Mon*, 37 N. Y. State Rep'r. 284.

In *People v. Morris*, 35 N. Y. State Rep'r. 942, it was *held* that evidence that the defendant when charged with

the crime in the presence of his wife made no denial, but seemingly admitted it, is sufficient to corroborate the complainant's testimony.

§ 283. *People v. Kirwan*, 51 N. Y. State Rep'r. 299.

§ 285. Where seduction is accomplished under promise of marriage, and the promise has been kept, no prosecution or conviction can be had after the marriage, and the question of good faith on the part of the man in entering into such marriage, cannot affect the question of his guilt or innocence. *People v. Gould*, 70 Mich. 240; 14 Am. St. Rep. 493.

§ 286. See *State v. Reese*, 97 Mo. 668; 10 Am. St. Rep. 349.

§ 292. This section is not unconstitutional as infringing on the rights of parents or those of the child. *People v. Ewer*, 47 N. Y. St. Rep'r. 501; 8 N. Y. Cr. Rep. 383.

§ 294. Mere advice not followed by any action on the part of the woman based upon such advice does not make out the crime of abortion. *People v. Phelps*, 133 N. Y. 267, affirm'g 61 Hun, 115.

§ 295. *People v. McGonegal*, 136 N. Y. 62.

§ 302. A single act of sexual intercourse between persons related by blood or affinity within the degree prohibited by statute constitutes incest. *State v. Brown*, 47 Ohio St. 102; 21 Am. St. Rep. 790.

§ 317. *People v. Danihy*, 63 Hun, 590.

§ 334. *Goodrich v. Houghton*, 134 N. Y. 116; 55 Hun, 526.

§ 344. See *People v. Dewey*, 33 N. Y. State Rep'r. 427; 11 N. Y. Supp. 602.

§ 351. The act of 1887, chapter 479, subjecting to taxation associations engaged in conducting horse races, and allowing such races to take place for a

period not exceeding thirty days in each year, although it does not expressly declare that pool selling at such times and places shall be legal, inferentially shows the intention of the legislature to have been to legalize such sales. *Brennan v. Brighton Beach Racing Association*, 56 Hun, 188; 30 N. Y. State Rep. 406. Of this decision the Harv. L. Rev. vol. 4, p. 38, observes: "We cannot agree with some of the daily papers that by this decision the court have given an effect to the law which is opposed to the intention of the legislature which passed it. Section 4 of the law provides for the suspension of sections 351 and 352 of the Penal Code during the days on which racing is authorized; and also, 'that pool selling shall be confined to the tracks where the racing takes place and to the days of the races.' At other times and places pool selling shall be severely punished. The suspended sections of the Penal Code make it a crime to sell pools, or in any way to aid in betting, or to race a horse for money. The only reasonable interpretation of these provisions is, that at the times and places mentioned pool selling is to be lawful. In the case before us, the pool tickets represented a contract which is good in substance, but which the courts have refused to enforce, as being contrary to law. The legislature expressly says that at certain times and places such a contract shall no longer be contrary to law. On what ground, then, can the court refuse to enforce it? Under the laws as framed, it would seem that no other decision could well have been reached." See *People v. Fisher*, 17 N. Y. Supp. 162.

§ 363. See *Rosenheim v. Rosenfield*, 37 N. Y. State Rep'r, 551; *Baron v. Yost*, 16 Daly, 441; *Matter of Randell*, 2 Connolly, 37.

§ 366. *Wagner v. Daly*, 50 N. Y. State Rep'r, 641; 67 Hun, 488.

§ 383. *People v. Rosenberg*, 67 Hun, 60.

§ 385. *Flynn v. Taylor*, 127 N. Y. 596; *People v. Kellogg*, 67 Hun, 550.

§ 421. *Vandewater v. Railroad Co.*, 135 N. Y. 583, rev'g 63 Hun, 186; *Petrie v. Railroad Co.*, 49 N. Y. State Rep'r, 283; 66 Hun, 287.

§ 451, subd. 3. In *People v. Most*, 29 N. Y. St. Rep. 97, affirmed 128 N. Y. 108, three witnesses for the people testified that defendant spoke at a public meeting of sympathizers with the Chicago anarchists, in which speech he denounced the prosecuting attorney and judges, and urged his hearers to arm themselves, and when the day came, to resist and kill these hirelings of the capitalists; that they had a weapon a hundred-fold worse than theirs. Defendant and eleven others contradicted this version of the speech. *Held*, that the question was one for the jury, and that the testimony of the witnesses for the people, if true, was sufficient to warrant a conviction.

§ 496. Not necessary to charge in the indictment or to prove on the trial that the defendant set the fire with intent to destroy the building. *People v. Fanshawe*, 187 N. Y. 68; 65 Hun, 76.

The provisions of this section are not qualified or affected by the provision of section 490 *post*. *People v. Fanshawe*, 137 N. Y. 68; 65 Hun, 76.

§ 488. *People v. Fanshawe*, 65 Hun, 85; 137 N. Y. 68.

§ 490. The intention of this section is to limit and qualify the provisions of section 488 *People v. Fanshawe*, 17 N. Y. 68; 65 Hun, 85.

§ 498. *People v. Bosworth*, 64 Hun, 77.

§ 503. *People v. Calvert*, 51 N. Y. State Rep'r, 187.

§ 504. A fruit stand erected on a street against a building, was about five feet in height and in length, and had a window and a door. *Held*, that it was a "booth" within the meaning of this section. *People v. Hagan*, 37 N. Y. St. Rep. 660.

§ 508. In *People v. Morgan*, 35 N. Y. State Rep'r, 643, it was held that where the instruments found on a person are adapted to the commission of the crime of burglary, and the circumstances justify a finding of an intent to use them to commit the crime, the case is one within this section, even if the instruments could be used innocently in legitimate business. It is not necessary that they should be of such a character that they are adapted to burglary only.

§ 511. *People v. Tower*, 137 N. Y. 457.

§ 521. *People v. Tower*, 137 N. Y. 457.

§ 526. State courts have jurisdiction of offenses against the Federal currency. *Stewart v. Jessup*, 51 Ind. 411; 19 Am. Rep. 738.

§ 528. See 9 Am. St. Rep. 241; *People v. Rice*, 35 N. Y. State Rep'r, 185; *Crocheron v. State*, 86 Ala. 64; 11 Am. St. Rep. 18; *Matter of McFarland*, 59 Hun, 306; *People v. Sherman*, 6 N. Y. Supp. 782; *People v. Evans*, 69 Hun, 222; *People v. Lawrence*, 137 N. Y. 517; *People v. Sherman*, 133 id. 349; *People v. Gottschalk*, 66 Hun, 67; *People v. Bosworth*, 64 Hun, 77; *People v. Pscherhofer*, id. 484.

In *Reg. v. Ashwell*, 16 Cox Cr. Cas. 1; 37 Eng. Rep. 767; 7 Cr. L. Mag. 485; 16 Q. B. Div. 190; 33 Alb. L. J. 68, the prisoner asked one K. to lend him a shilling, and K. gave him what he supposed to be a shilling, but which was in fact a sovereign. The prisoner changed the sovereign, kept

the change, and when told by K. of the mistake, denied the receipt of the sovereign, but afterward admitted that he had the sovereign and had spent half the money. *Held*, larceny.

§ 530. *People v. Pscherhofer*, 64 Hun, 484.

§ 550. 68 Hun, 78.

§ 552. *People v. Barondess*, 133 N. Y. 649; 61 Hun, 571; 8 N. Y. Cr. Rep. 234.

§ 553. *People v. Barondess*, 133 N. Y. 649; 61 Hun, 571; 8 N. Y. Cr. Rep. 234.

§ 554. *People v. Hughes*, 137 N. Y. 29.

§ 629. *First Nat. Bank v. Dean*, 17 N. Y. Supp. 376.

§ 637. *People v. Fanshawe*, 137 N. Y. 75.

§ 639, subd. 8. In this section the word "willfully" means not simply a voluntary and intentional act, which is in fact wrongful, but one done with a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness. *Wass v. Stephens*, 128 N. Y. 123.

§ 640, subd. 8. Proof that defendant dragged his rakes for a long distance over ground which had been planted with oysters, and that such act must necessarily disturb them, is sufficient to warrant a conviction; it is not necessary that any of the witnesses should have seen an oyster disturbed. *People v. Decker*, 32 N. Y. State Rep'r, 956.

The admission of the evidence of expert witnesses that rakes rigged in the manner defendant's were would disturb oysters, is not prejudicial to defendant, where he admits that his rakes would go to the bottom and disturb oysters if any were there. *Id.* subd. 9. *People v. Upton*, 29 N. Y. St. Rep'r, 777.

§ 646. *People v. Upton*, 29 N. Y. 51 N. Y. St. Rep'r, 344; 67 Hun, State Rep'r, 777. 525.

§ 652. *Fisher v. Village of Cambridge*, 133 N. Y. 527. § 702. *People v. Hughes*, 137 N. Y. 29.

§ 654. See *People v. Christy*, 65 Hun, 350. § 704. *People v. Hughes*, 137 N. Y. 29.

There must be proved an unlawful § 714. *People v. Bosworth*, 64 Hun, as well as a willful destruction of 80.

property. *People v. Kane*, 131 N. Y. 111. § 715. *People v. Wood*, 126 N. Y. 249; *People v. Lewis*, 16 N. Y. Supp.

§ 675. *Reynolds v. Everett*, 67 Hun, 304. 881; *People v. Bosworth*, 64 Hun, 80.

§ 677. *People v. Christy*, 65 Hun, 350. § 718, subd. 3. *People v. Stark*, 85 N. Y. State Rep'r, 154; *Anderson v. How*, 116 N. Y. 341; *People v. Camp*, 51 N. Y. St. Rep'r, 34; 66 Hun, 535.

§ 686, subd. 2. *People v. O'Connell*, 60 Hun, 109. Subd. 15. *People v. Christy*, 65 Hun, 351.

§ 688. *People v. Bosworth*, 64 Hun, 80. § 720. *Reynolds v. Everett*, 67 Hun, 305.

§ 700. *People ex rel. Duntz v. Coon*,

COMPILATION
OF
FELONIES AND MISDEMEANORS
UNDER PROVISIONS OF
CHAPTER 35, LAWS OF 1889.

The following list of misdemeanors under the head "Auctions," excepting the last, have been in my opinion repealed or superseded.

As, however, this has not been judicially determined, and this conclusion may not be accepted by all, as (see note of editor of the last edition of the Revised Statutes, page 416, volume 2) I have concluded to include them in this schedule with this explanation.

AUCTIONS.

Every person who shall sell or attempt to sell at public auction any goods or effects liable to duty charged without having given a bond as required by law, shall be deemed guilty of a misdemeanor.

And every auctioneer who shall, during his term of office, accept an appointment from any other State, or shall be concerned as principal or partner in selling any goods, wares, merchandise or effects in any other State at public auction, or who shall receive any reward, compensation or benefit for or on account of such sale, shall be deemed guilty of a misdemeanor.

And any auctioneer in any city of this State who shall at the same time have more than one house or store for the purpose of holding his auctions, or who shall expose to sell by public auction

any goods or articles liable to auction duties at any other place than that designated in a writing signed by him as the place of holding his auctions, except goods sold in original packages as imported, household furniture, and such bulky articles, shall be deemed guilty of a misdemeanor.

And every person who shall be guilty of any fraud or deceit in connection with his duties as auctioneer, or who shall seek to elude or defeat that portion of the provisions of the law applicable to auctioneers, shall be deemed guilty of a misdemeanor.

Any auctioneer who shall sell at public auction between sunset and sunrise, any goods other than

1. Books or prints.

2. Goods sold in the original package, as imported, according to a printed catalogue, of which samples shall have been opened and exposed to public inspection, at least one day previous to the sale, in the cities of New York and Albany, shall be guilty of a misdemeanor.

Laws 1880, Chap. 310. Every broker or auctioneer who shall sell any goods, wares, merchandise or effects without having filed the bond required, or who shall neglect to make and render an account, or to pay over duties, as required by law, is guilty of a misdemeanor.

BANKS.

Laws 1882, Chap. 409, § 7. Receiving any pay or compensation by the superintendent of the banking department, or any of his clerks or employees, for any services rendered in the banking department, other than the compensation allowed by law, is a misdemeanor.

— § 13. Willful, false swearing by any bank officer or employee, in any bank examination, shall be perjury.

— § 20. All willful, false swearing in reference to reports made by discount banks to the superintendent, shall be deemed perjury.

— § 75. Any superintendent or other officer who shall countersign bills or notes for any person or association in excess of the amount of stocks deposited with the superintendent on account thereof, shall be guilty of a misdemeanor.

— § 117. Every violation of section 117 by any officer or member of a banking association, shall be a misdemeanor.

Laws 1882, Chap. 409, §§ 114, 115, 118, 119. Any officer or clerk of any banking association or individual banker, or any individual banker, who shall knowingly act or assist in the violation of the provisions of sections 114, 115, 118, shall be deemed guilty of misdemeanor.

— §§ 125, 128. A second refusal by any officer of any corporation mentioned in section 125 to exhibit the stock book kept by such corporation is a misdemeanor.

— § 174. Any use of the plates and dies of any banking association converted into a national association for the manufacture of notes or bills, shall be a misdemeanor.

Laws 1887, Chap. 546, § 33. Willful, false swearing to the statement of assets by any trustee of a trust company, is a misdemeanor.

Laws 1882, Chap. 409, § 273. Willful, false swearing in regard to any report required to be made to the superintendent of the banking department by chapter 409, Laws of 1882, is perjury.

— § 286. The investment by any trustees or officers of a savings bank of the funds in their hands in any securities not named in chapter 409, Laws of 1882, and its amendments, is a misdemeanor.

Laws 1885, Chap. 329, § 311. Whoever shall offend against the provisions of section 311, shall be guilty of a misdemeanor.

Laws 1875, Chap. 564, § 2. Willful, false swearing to any report of any building, mutual, loan and accumulating fund association, is perjury.

Laws 1887, Chap. 556, § 19. Willful, false swearing to any report of any co-operative savings and loan association to the superintendent of the banking department, is perjury.

CANALS.

Laws 1854, Chap. 329. Any engineer or other officer or person in the employ of the State, who shall knowingly make any false representation or estimate of the nature, quality, quantity or cost of any work proposed by the State, or any individual, to be done, or of any material so proposed to be furnished for any canal or its appurtenances, or any false representation or estimate in any statement of work or materials so proposed, which may be required by the canal board, any canal commissioner, or any

other board or officer, or who shall knowingly report or certify to any false statement of the amount of any work done, or purporting to have been done, for the State, or of the quality or nature of such work, or of the quality or quantity of any materials furnished, or purporting to have been furnished, to the State by which any person may be enabled to claim or receive a greater allowance than is justly due, shall be deemed guilty of a misdemeanor. (See section 470, Penal Code, etc.)

Laws 1855, Chap. 534, § 4. Any officer or employe of the State upon or connected with any of the canals of this State, who shall be cognizant or have any information of the commission of, or attempt to commit, by any person any fraud upon the revenues of the canals, and shall not discover the same and enforce the penalties, if within his power, shall be deemed guilty of a misdemeanor.

Laws 1861, Chap. 124, § 4. Every collector of canal tolls and every weighmaster or weighmaster's clerk who shall weigh a boat and cargo, and shall knowingly make a false entry of the true weight of such boat and cargo, or shall make a false certificate of the light weight of any boat, shall be deemed guilty of a misdemeanor.

CORPORATIONS.

Laws 1878, Chap. 203, § 33. Any person who shall knowingly neglect or refuse to transport any product delivered for transportation to any pipe line company incorporated under chapter 203, Laws of 1878, according to the general rules and regulations fixed by said company, or to refuse to accept and allow a delivery thereof in the order of application, or charge more than the sum fixed in such general rules and regulations, or accept or agree to accept less than the amount fixed in such rules and regulations, or allow or pay, or agree to allow or pay, or suffer to be allowed or paid or repaid any drawback or rebate or allowance in any manner, so that any person by any device shall have or procure the transportation of products over such pipe line at any less rate, cost, expense or charge than is expressed in such rules and regulations, shall be deemed guilty of a misdemeanor.

— § 38. Any person who shall willfully injure or destroy any pipe or other property of any such company, shall be guilty of a misdemeanor

Laws 1878, Chap. 203, § 42. Any person willfully violating the provisions of section 42, shall be guilty of a misdemeanor. (Above act does not apply to the city of New York.)

Laws 1879, Chap. 217, § 2. Any person who shall violate the provisions of the act in relation to oil wells, being chapter 217 of the Laws of 1879, as amended by chapter 65 of the Laws of 1882, shall be guilty of a misdemeanor.

Laws 1886, Chap. 310, § 9. Willful false swearing by any witness or creditor upon any examination to enable the receiver of a corporation to ascertain the nature, extent and location of its property, shall be deemed perjury.

— Chap. 546. Any willful trespass in or upon any of the buildings or grounds provided for the meetings of any corporation duly incorporated under the laws of the State of New York for benevolent or charitable or literary or scientific or missionary or mission or Sunday-school purposes, or for the purpose of mutual improvement in religious knowledge, or for the furtherance of religious opinion, or for the purpose of promoting morality, or for any two or more of such objects, and any willful injury to any of said buildings or said grounds, or any trees, fences, fixture or other property thereon and pertaining thereto, and any willful disturbance of the peace and quietness of said grounds by intentional breach of the rules and regulations thereof, shall be a misdemeanor.

Laws 1886, Chap. 547, § 1. A person who, with intent to defraud, forges, counterfeits or falsely alters and wrongfully utters any ticket, contract or other paper or writing entitling, or purporting to entitle, the person whose name appears therein, or the proprietor thereof, to entrance upon the grounds or premises, or being thereupon to remain upon any such grounds or premises, of any corporation duly incorporated under chapter 319 of the laws of the State of New York, passed April 12th, 1848, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies" and the acts amendatory thereof and supplementary thereto. *And a person who, with intent to defraud, uses such forged or counterfeited, or falsely altered ticket, contract or other paper in writing, to effect an entrance upon such grounds or premises. And a person who, being upon such

*Capitals and punctuation, as in original.

grounds or premises with like intent, uses such forged or counterfeited, or falsely altered ticket, contract or other paper or writing, as evidence of his right to remain upon such grounds or premises. *And a person who, with like intent, sells, exchanges, or delivers or keeps, or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, contract, or other paper or writing, knowing the same to have been forged, counterfeited, or falsely altered, is guilty of forgery in the third degree, and punishable as by law provided in cases of forgery of that degree.

Laws 1886, Chap. 547, § 2. A person who, with intent to defraud any corporation mentioned in the foregoing section by means of a ticket, contract or other paper or writing, appearing on its face not negotiable, and which entitles, or purports to entitle, the person whose name appears therein to entrance upon the grounds or premises, or being thereupon, to remain upon such grounds or premises of such corporation, shall falsely personate any individual or individuals named in such ticket, contract or other paper or writing, as the grantee or beneficiary thereof, with intent wrongfully to convert to his or her own use the benefits secured, or which purport to be secured by such ticket, contract or other paper or writing, to the person or persons named therein as the grantee or beneficiary thereof, and who shall by such false personation secure such benefit. *And a person who, with like fraudulent intent, shall attempt so falsely to personate the person or party named in such ticket, contract or other paper or writing, with intent to defraud such corporation, and to wrongfully convert to his or her own use the benefit secured, or which is purported to be secured by such ticket, contract or other paper or writing, to the person or party named therein, as the grantee or beneficiary thereof, is guilty of a misdemeanor, punishable as by law in such case made and provided.

Laws 1888, Chap. 581. Any person or persons violating the provisions of chapter 581, Laws 1888, in relation to the regulation of fees and charges of floating and stationary elevators, shall be guilty of a misdemeanor.

Laws 1889, Chap. 489. Any person, corporation or association operating any ferry in this State, or between this State and

*Capitals and punctuation, as in original.

any other State, from or to a city of 500,000 inhabitants or over, who shall fail to post in a conspicuous and accessible place in each of its ferry-houses, in plain view of its passengers, a schedule plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged, or who shall post a false schedule, shall be guilty of a misdemeanor.

DAIRY.

Laws 1882, [Chap. 215 — chapter 183 of the Laws of 1885, § 8, as amended by chapter 577 of the Laws of 1886. Any person or persons, firm or corporation who shall manufacture with intent to sell any article or substance in semblance of natural butter or natural cheese, not the legitimate product of the dairy, and not made exclusively from milk or cream, or both, with salt or rennet, or both, and with or without coloring matter or sage, but into which any animal, intestinal or offal fats, or any oils or fats of any kind whatsoever not produced from milk or cream, or into which melted butter, lard or tallow shall be introduced, shall add thereto or combine therewith any annatto or compounds of the same, or any other substance or substances whatsoever, for the purpose or with the effect of imparting thereto a color resembling that of yellow, or any other shade of butter or cheese; or deal in, sell, expose for sale, or give away, any such article or substance in semblance of natural butter or natural cheese, and known as oleomargarine or imitation of butter or cheese; and any keeper of any hotel or restaurant, boarding-house or other place of entertainment, who shall keep, use or serve, either as food for their guests, or for cooking purposes, any such imitation of butter or cheese colored contrary to the provisions of this act; or any person, firm or corporation who shall manufacture with intent to sell, deal in, sell or expose for sale any such imitation of cheese unless the words "imitation of cheese" shall be plainly stenciled in plain Roman letters at least one-half inch in length with durable paint, upon the sides of each and every box containing the same, shall be guilty of a misdemeanor.

Laws 1882, Chap. 238. Any person who shall sell, or offer, or expose for sale, or export to any foreign country, or cause or procure to be sold or offer to be exposed for sale, by the tub, firkin, box or package, or in any greater quantity, any article or substance

in semblance of butter or cheese not the legitimate product of the dairy and not stamped or branded as required by the provisions of chapter 238 of the Laws of 1882, shall be guilty of a misdemeanor.

Laws 1882, Chap. 246. Any person who shall hereafter sell either at wholesale or retail, any oleomargarine, butterine, suine or other substance not butter, and represent the same to be butter, shall be guilty of a misdemeanor.

Laws 1884, Chap. 202. Whoever sells or exchanges or exposes for sale or exchange, any unclean, impure, unhealthy, adulterated, or unwholesome milk, or offers for sale any article of food from the same or from cream from the same, is guilty of a misdemeanor.

— . Whoever shall keep cows for the production of milk for market, or for sale or exchange, or for manufacturing the same, or cream from the same, into articles of food, in a crowded or unhealthy condition, or feed the cows on food that is unhealthy, or that produces impure, unhealthy, diseased or unwholesome milk; or manufactures from impure, unhealthy, diseased or unwholesome milk or cream from the same, any article of food, is guilty of a misdemeanor.

— . Whoever shall sell, supply or bring to be manufactured, to any butter or cheese manufactory, any milk diluted with water, or any unclean, impure, unhealthy, adulterated or unwholesome milk, or from which any cream has been taken (except pure skim milk to skim cheese factories) or shall keep back any part of the milk commonly known as "strippings," or bring or supply to any butter or cheese manufactory, milk that is sour, shall be guilty of a misdemeanor. (Also, see chapter 427, Laws of 1885.)

— . And no butter or cheese manufacturers, except those who buy all the milk they use, shall use for their own benefit or allow any of their employes, or any other person, to use for their own benefit, any milk, or cream from the milk, or the product thereof brought to said manufactories, without the consent of the owners thereof, and every butter or cheese manufacturer, except those who buy all the milk they use, shall keep a correct account of all the milk daily received, and the number of pounds and packages of butter, the number and aggregate weight of cheese made each day, and the number of packages

of cheese and butter disposed of, which record shall be open to inspection to any person who delivers milk to said manufacturer ; and whoever violates any of these foregoing provisions, is guilty of a misdemeanor.

Laws 1884, Chap. 202. Any manufacturer of vessels for the package of butter who shall sell or dispose of any such vessels without branding his name and the true weight of the vessel or vessels on the same with legible letters or figures, not less than one-quarter of an inch in length, is guilty of a misdemeanor.

— . Whoever shall sell or offer or expose for sale any milk, except in the county from which the same is produced, unless the can, vessel or package containing such milk shall be distinctly and durably branded with letters not less than one inch in length, on the outside, above the center, on every such can, vessel or package, with the name of the county from which the same is produced, shall be guilty of a misdemeanor, and the same mark shall be branded or painted in a conspicuous place on the carriage or vehicle in which the milk is drawn to be sold, and the milk can only be sold out of such can, vessel or package so branded ; and a violation of these provisions is a misdemeanor.

— § 6. Whoever shall manufacture out of any oleaginous substance, or substances, other than that produced from unadulterated milk or cream any article designed to take the place of butter or cheese, or shall sell, or offer for sale, the same as an article of food, except pure skim milk cheese made from pure skim milk, shall be guilty of a misdemeanor.

— § 7. Whoever shall offer, sell or expose for sale any full packages of butter or cheese, branded or labeled with a false brand or label, as to county or State in which such article is made, or shall use a stencil brand furnished by the New York State dairy commissioner upon any other than full cream cheese, or packages containing the same, shall be guilty of a misdemeanor. (As amended by chapter 193, Laws of 1885.)

— § 8. (See, also, section 11, chapter 183, Laws of 1885.) Whoever shall manufacture, sell or offer for sale, any condensed milk, unless the same shall be put up in packages upon which shall be distinctly labeled or stamped the name or brand by whom or under which the same is made, or who shall sell or offer for sale, any condensed milk manufactured from other than

pure, clean, healthy, fresh, unadulterated, unwholesome milk, or unless the proportion of milk solids in the same shall be in amount the equivalent of twelve per centum of milk solids in crude milk of which twenty-five per centum shall be fat, or who shall sell condensed milk from cans or packages hermetically sealed without the vendor's name branded or labeled upon such can or package with the name of the county or counties in which the same was produced, is guilty of a misdemeanor.

Laws 1885, Chap. 183, as amended by Laws 1885, chapter 450, as amended by Laws 1886, chapter 577, as amended by Laws 1888, chapter 550. Any person or persons who shall sell or exchange, or expose for sale or exchange, any unclean, impure, unwholesome, adulterated milk, or any article of food made from the same, shall be guilty of a misdemeanor. (This provision shall not, however, apply to pure skim cheese or pure skim milk sold for use in the county in which it is produced, or any adjoining counties, except New York and Kings.)

— Any person who, by himself or his agents, shall render or manufacture any article or product in imitation or semblance of natural butter or cheese, not produced from unadulterated milk or cream from the same, or who shall sell, keep, or offer for sale any such article, whether produced in this State or elsewhere, shall be guilty of a misdemeanor.

— Any manufacturer using the brand "full milk cheese" upon any cheese made from which any cream whatever has been taken shall be guilty of a misdemeanor.

— Whoever shall offer, sell or expose for sale in full packages, butter or cheese branded or labeled with a false brand or label, as to the county in which or State in which the article is made, is guilty of a misdemeanor.

— and Laws 1887, Chap. 583. Any person, who, as keeper or proprietor of any bakery, hotel, tavern, boarding-house, restaurant, saloon, lunch-counter, or place of public entertainment, shall keep, use or serve therein, either as food for guests, boarders, persons or customers, or for cooking purposes, any article made in violation of the provisions of section 7, chapter 183, Laws of 1885, as amended by chapter 577, Laws of 1886, and chapter 583, Laws of 1887, shall be guilty of a misdemeanor.

ELECTIONS.

Laws 1842, Chap. 130. Any elector challenged as unqualified who shall willfully swear or affirm falsely shall be guilty of perjury.

— Any person who shall willfully and corruptly procure any other person to swear or affirm falsely shall be guilty of subornation of perjury.

— Any officer guilty of any willful neglect or corrupt conduct in relation to the discharge of his duties at any election shall be guilty of a misdemeanor.

— Any person who shall by bribery, menace or other corrupt means, directly or indirectly, attempt to influence any elector of this State in giving his vote or ballot, or deter him from giving the same, or disturb or hinder him in the free right of suffrage, shall be guilty of a misdemeanor.

— Every person offending against the provisions of the general election law shall be guilty of a misdemeanor.

— Any person who shall willfully disobey any lawful commands of the board of inspectors of any election, or shall willfully and without authority obstruct, hinder or delay any elector on his way to any poll, or while he is exercising or attempting to exercise the right of voting, or shall aid or assist in such obstruction or delay, shall be guilty of a misdemeanor.

— Any person who shall knowingly vote or offer to vote at any general, or special, or city or charter election, in any election district in which he does not reside, or shall vote or offer to vote more than once at the same election, shall be guilty of a misdemeanor.

— Any person who shall procure, aid, assist, counsel or advise another to give or offer his vote at any general, town, city or charter election, knowing that such person is not duly qualified to vote at such place, shall on conviction be adjudged guilty of a misdemeanor.

— Every person who shall procure, aid, assist, counsel or advise another to go or come into any town, ward or election district for the purpose of his giving his vote at any general, special, town or city election, knowing that such person is not duly qualified to vote at such place, is guilty of a misdemeanor.

Laws 1842, Chap. 130. Any person not duly qualified to vote under the laws of this State who shall knowingly vote, or offer to vote, at any general or special town or charter election in this State, is guilty of a misdemeanor.

— Any inhabitant of another State or county who shall vote, or offer to vote, at any general, special, town or city charter election in this State shall be guilty of a felony.

Laws 1847, Chap. 240, § 16. Any inspector of election knowingly and willfully permitting or suffering any person to vote at any election, who is not entitled to vote thereat, is guilty of a misdemeanor.

Laws 1864, Chap. 253. Every person who shall be entitled to receive a ballot or envelope, containing the ballots of soldiery electors now in the actual military service of the United States, before he shall receive and take away the same from the post-office shall sign and deliver to the postmaster, his deputy or clerk, a receipt therefor, which receipt shall specify how many ballots or envelopes he has received, etc. Any willful omission to comply with these provisions is a misdemeanor.

— Any inspector of election and any elector to whom said ballots shall be sent, who shall willfully neglect or refuse to perform any of the duties required of him by said act (chapter 253, Laws of 1864) shall be guilty of a misdemeanor.

— § 9. Every person who shall be guilty of willful and corrupt false swearing or affirming, in taking any oath or affirmation prescribed by this act, shall be adjudged guilty of perjury.

— § 10. Every person who shall sign a false certificate to any instrument or affidavit, authorized by this act, shall be deemed guilty of a misdemeanor.

— § 11. Every person who shall deliver or present to the inspectors of election any forged, altered or changed ballot or instrument, knowing the same to be forged, altered or changed, is guilty of a misdemeanor.

— § 13. Any person of this State, or of the United States, or any other person, who shall directly or indirectly control, or attempt to control, any such enlisted elector in the exercise of any of his rights under said act, shall be guilty of a misdemeanor.

Laws 1870, Chap. 388. Any register, inspector or other officer of elections who shall require any oath from any colored

man, other than or different from the oath which they are required to tender or require of a white man in like cases, is guilty of a misdemeanor.

Laws 1872, Chap. 570, § 7. Any person making any false statement to the clerk at the poll in relation to any of the matters inquired about concerning his registry for voting shall be deemed guilty of a misdemeanor.

— § 14. Any person who shall cause his name to be registered in more than one election district, or in a ward or district where he knows he is not a qualified voter, or who shall falsely personate any registered voter, and any person carrying any such act, or aiding, abetting, inducing or procuring any person to be falsely registered, or causing or procuring, or being in any manner instrumental in procuring any person to vote, or offering to vote, in any district in which such person is not at the time a legally qualified voter, or who shall advise or incite any person to vote, or offer to vote, at any election in an assumed and fictitious name, shall be guilty of a felony. Any person who shall swear before said board of registration shall be deemed guilty of perjury and corrupt perjury. Any member or officer of the board of registration who shall knowingly permit any person to register his name as a voter, or willfully violate any of the provisions of the registry laws, or be guilty of any fraud in the execution of the duties of his office, shall be guilty of a felony.

Laws 1880, Chap. 56. Any person acting as inspector of election or clerk of the poll, not able to read and write the English language, is guilty of a misdemeanor.

— § 18. Every inspector of election or clerk of the poll who shall intentionally make, or attempt to make, any false canvass of the ballots cast at an election, or make, or attempt to make, any false statement of the result of any canvass, shall be guilty of a felony.

— § 19. Any person who shall induce, or attempt to induce, any inspector of election or clerk of the poll to do any act forbidden by the last section, shall be guilty of a felony.

— § 20. Every inspector of election or clerk of the poll who shall intentionally omit, neglect or refuse to do any act required of him as such inspector; and every inspector of election, clerk of the poll, policeman, member of any police force, or other person who shall intentionally refuse to permit the doing of any act hereby

allowed to be done by any watcher or elector, or shall intentionally prevent, or attempt to prevent, the doing thereof, shall be guilty of a misdemeanor.

Laws 1880, Chap. 142, § 11. Any officer of the town or any member of the board of registration charged with any duties under Laws of 1880, chapter 142, who shall willfully or corruptly neglect or refuse to perform any such duties, shall be guilty of a misdemeanor. Any person who shall, with the intent of voting illegally at any such annual town meeting or election, procure or cause his name to be enrolled as entitled to the right of suffrage in said town, being at the time a non-resident of said town, or otherwise disqualified, and knowing or having reason to believe that he will not be entitled to vote at the then ensuing election shall be guilty of a misdemeanor.

Laws 1880, Chap. 366. Any person who shall knowingly or willfully violate, or attempt to violate, any of the provisions of this act, shall be guilty of a misdemeanor.

Laws 1880, Chap. 576. Any inspector of election mentioned in section 1 of chapter 576, Laws of 1880, who shall willfully absent himself from his duties shall be deemed guilty of a misdemeanor.

— Every person who shall willfully make a false statement at the time of offering his vote, as required by section 7, shall be guilty of a misdemeanor.

— § 13. Any willful false swearing upon an examination before an inspector of election shall be deemed perjury.

— § 14. Any person who shall cause his name to be registered in more than one election district, or who shall cause his name to be registered, knowing that he is not a qualified voter in the town or district where said registry is made, or who shall falsely personate any registered voter, and any person causing any such act, or aiding or abetting any person in any manner in either of said acts, shall be guilty of a felony. All false swearing before said board of registration shall be deemed perjury.

— Any willful violation of the provisions of chapter 576, Laws of 1880, by any member or officer of said board of registration, shall be deemed felony.

Laws 1882, Chap. 154. Any person who shall falsely personate and vote under the name of any other person at any political primary election, or shall willfully and wrongfully obstruct and

prevent others from voting who have the right to do so, or in any manner intentionally and wrongfully deposit ballots in the ballot-box, or conceal or destroy ballots cast, or take them therefrom, or commit any other fraud or wrong tending to defeat or affect the result of the election, shall be guilty of a misdemeanor. Does not apply to cities of over 10,000 inhabitants. (Section 24, chapter 265, Laws of 1887.)

Laws 1882, Chap. 154, § 2. Any person intentionally swearing falsely when sworn by the presiding officers and inspectors of any such election shall be deemed guilty of perjury.

— § 3. Any person acting as inspector, teller or canvasser at any such election, who shall knowingly receive the vote of any individual who shall have been challenged, or who is known to him not to be entitled to vote at such primary election, or shall in any manner fraudulently and wrongfully deposit or put any ballots into or take any from the ballot-box, or shall fraudulently and wrongfully mix any ballots with those cast at said primary election, or knowingly make any false account, canvass, statement, certificate or return, shall be deemed guilty of a misdemeanor.

— § 4. Any person elected a delegate at any such primary or convention, who shall accept or receive any money or valuable thing as a consideration for his vote, shall be deemed guilty of a misdemeanor.

Laws 1882, Chap. 366, § 2. Any person intentionally making false answers to any questions put to him by the presiding officers or either of the presiding officers of any caucus or assembly, he having first been sworn by them, shall be deemed guilty of perjury.

Laws 1883, Chap. 422. Any person guilty of violating any provisions of chapter 422, Laws of 1883, in reference to the suppression of political assessments, shall be deemed guilty of a misdemeanor.

Laws 1886, Chap. 783. If any person shall, by bribery, menace or other corrupt means or device whatsoever, directly or indirectly attempt to influence any person, delegate or substitute, entitled under the call of any political party of this State to vote in any primary meeting, caucus or convention of any such party, in giving his vote or ballot, or deter him in giving the same, or hinder him in the free exercise of the right of suffrage at any

such primary meeting, caucus or convention, he shall be adjudged guilty of a misdemeanor.

Laws 1887, Chap. 265, § 14. Any person swearing falsely as to his qualifications as a voter before any inspector at any primary election will be deemed guilty of perjury.

— § 17. Every inspector, teller or canvasser at any primary election, who shall knowingly receive the vote of any individual who shall have been challenged, or who is known to him not to be entitled to vote, unless the same shall be first sworn in as aforesaid, or shall in any manner fraudulently or wrongfully deposit or put any ballots into or take any from the ballot-box of said primary election, or shall fraudulently or wrongfully mix any ballots with those cast at such primary election, or shall knowingly make, or attempt to make, any false canvass of the ballots cast at any election, or shall knowingly make, or attempt to make, any false statement of the result of any canvass, will be guilty of a felony.

— § 18. Any person who shall induce, or attempt to induce, any inspector of election to do any act forbidden by the last section shall be guilty of a felony.

— § 19. If at any political primary held by any political party, organization or association in this State, any person shall falsely personate and vote, or attempt to vote, under the name of any other person, or shall intentionally vote, or attempt to vote, without the right to do so, or willfully or wrongfully obstruct or prevent others from voting who have the right to do so, or fraudulently or wrongfully conceal or destroy ballots cast, or deposit ballots in the ballot-box or take them therefrom, or permit any other fraud or wrong, tending to defeat or affect the result of the election, he shall be deemed guilty of a misdemeanor.

— § 20. Every inspector of election who shall intentionally omit, neglect or refuse to do any act required by this act, and every inspector of election, policeman, member of any police force, or other person, who shall intentionally refuse to permit the doing of any act allowed to be done by this chapter by any watcher or elector, or intentionally do any act forbidden by this act, shall be deemed guilty of a misdemeanor.

EXCISE.

Laws 1857, Chap. 628, § 15, as amended by chapter 420, Laws of 1877. Whoever shall, either personally or by his wife, servant, employee or other agent, sell or give strong or spirituous liquors or wine to any apprentice, knowing or having reason to believe him to be such, without the consent of his master or mistress, or to any one under the age of eighteen years without the consent of his father or mother or guardian, shall be guilty of a misdemeanor.

Laws 1857, Chap. 628, § 20. If any inn, tavern or hotel-keeper, or any other person or persons whatsoever, knowingly shall sell or give to any pauper or inmate of any poor-house or alms-house, outside of said poor-house or alms-house, any strong or spirituous liquors or wines, such persons shall be guilty of a misdemeanor.

Laws 1857, Chap. 628, § 21, as amended by chapter 549, Laws of 1873. Any inn, tavern or hotel-keeper, or other person, who shall sell or give away any intoxicating liquors or wine on Sunday or upon any day on which a general or special election or town meeting shall be held, and within one-quarter of a mile from the place where said general or special election or town meeting shall be held, in any of the villages, cities or towns of this State, to any person whatsoever as a beverage, shall be guilty of a misdemeanor.

Laws 1857, Chap. 628, § 29. Any person who shall adulterate intoxicating liquors with poisonous or deleterious drugs or mixtures, or sell the same, or knowingly import or sell intoxicating liquors or wines adulterated with poisonous or deleterious drugs or mixtures, shall be guilty of a misdemeanor.

Laws 1865, Chap. 266. Any person who shall sell or give away any strong or spirituous liquors or wines, or fermented liquors, or opium or tobacco, to any patient belonging to the New York State Inebriate Asylum, shall be guilty of a misdemeanor.

Laws 1880, Chap. 429. Any person who shall introduce into any poor-house, juvenile reformatory, protectory, house of refuge, jail, penitentiary or prison, or bring upon the premises thereof, any wine, alcoholic, malt or intoxicating liquors, except upon the written requisition of the medical officer of such institution, or any trustee, manager, officer, agent, employee, or other person connected with any such institution or the inmates thereof, to use,

to offer to others, or to allow to be used within any such institution, or upon the premises thereof, any wine, alcoholic, malt or intoxicating liquors, except by the direction and prescription of the medical officer of such institution, shall be deemed guilty of a misdemeanor.

Laws 1883, Chap. 340. Any person who shall without a license sell or give away any strong or spirituous liquors, ale, wine or beer, to be drank upon the premises, shall be guilty of a misdemeanor, in any city having a population of more than 3,000.

Laws 1885, Chap. 444. Any person in any city or town of 6,000 inhabitants or more, who shall sell or furnish any wine, beer or strong or spirituous liquor to any person in any building used as a skating rink or in any apartment connected therewith by any door, window or other aperture, shall be deemed guilty of a misdemeanor.

Laws 1887, Chap. 679, § 1. Whoever shall sell any strong or spirituous liquors, wine, ale or beer, in quantities of five gallons or more at a time in any town, city or village in this State in which there is not in force at the time of such sale a license permitting the sale of such strong and spirituous liquors, wine, ale or beer in quantities less than five gallons at a time, shall be guilty of a misdemeanor.

Laws 1888, Chap. 35, §§ 1, 2. Any person who shall sell, expose for sale, give away, or have in his possession for the purpose of selling or giving away on the ground or premises on or in which any State, county, town or other agricultural or horticultural fair is being held any strong or spirituous liquors, wines, ales, beer or fermented cider, or who shall sell or give away any strong or spirituous liquors, wines, ales, beer or fermented cider, within two hundred yards of the premises on or in which any State, county, town or agricultural or horticultural fair is held, except within the limits of any city having a population of over 500,000, shall be guilty of a misdemeanor.

GAME.

Laws 1879, Chap. 534, is the general law in force in this State in reference to the preservation of moose, wild deer, birds, fish and other game.

§ 1 of said act, as amended by chapter 194, Laws of 1886, and chapter 501, Laws of 1888. § 2. § 3, as amended by chapter 194, Laws of 1886. § 4, as amended by chapter 539, Laws of 1889. § 5, § 6, § 7, as amended by chapter 591, Laws of 1887. § 8, as amended by chapter 584, Laws of 1880. § 9, as amended by chapter 269, Laws of 1884. §§ 10, 11. (§§ 12 and 13, as amended by the Laws of 1880, are apparently repealed by chapter 427, Laws of 1886.) § 15, § 17, as amended by chapter 243, Laws of 1885. § 18, as amended by chapter 618, Laws of 1887. § 19, as amended by chapter 617, Laws of 1887. § 20, as amended by chapter 617, Laws of 1887. § 21, as amended by chapter 619, Laws of 1887. §§ 22, 23, as amended by chapter 127, Laws of 1884. § 24, as amended by chapter 11, Laws of 1886. § 25, as amended by chapter 430, Laws of 1881. (And also see chapter 300, Laws of 1886.) § 26, as amended by chapter 237, Laws of 1885. § 28, as amended by chapter 623, Laws of 1887. § 30, § 32, § 35, § 42, each create a misdemeanor.

Laws 1873, Chap. 665. Any person convicted of willfully and wrongfully taking any fish from any private pond, without the consent of the owner thereof, or who shall willfully place any poisonous or other substance injurious to the health of fish in a private pond or stream used for propagating or preserving fish, with intent to capture or harm any fish, or who shall wrongfully and willfully let the water out of any such pond with intent to take fish from such pond or to do harm to such fish, shall be guilty of a misdemeanor.

Laws 1875, Chap. 55, makes it a misdemeanor for any person to catch or attempt to catch fish with any device whatever within a distance of eighty rods from any fishway established or constructed by the State in any stream or water-course within its boundaries.

Laws 1881, Chap. 704, § 1. Any person or persons who shall sell or offer for sale oysters in the shell by measure in any other than the lawful sealed measure provided in § 1, chapter 704, Laws of 1881, shall be guilty of a misdemeanor.

Laws 1884, Chap. 247, § 1, makes it a misdemeanor to draw or use any seine, or catch or kill any fish by the use of any seine in any of the waters of the Hudson river between trestle or bank of any railroad running along said river and the adjacent bank of said river.

Laws 1886, Chap. 427, § 6, makes it a misdemeanor to intentionally give food or shelter to the English or European house sparrow.

— § 7, makes it a misdemeanor to violate any of the other provisions.

Laws 1886, Chap. 522, makes it a misdemeanor to use any pound or purse net in the waters of the Hudson river from the first day of June to the fifteenth day of October in each and every year.

Laws 1887, Chap. 407, makes it a misdemeanor for any person to take any shad from the waters of the Hudson river north of the Westchester county line, by means of any seine, net or other device whatever, from sunset on Saturday to sunrise on the following Monday, between the fifteenth day of March and the fifteenth day of June in each year.

Laws 1887, Chap. 530, makes it a misdemeanor for any person using nets in that part of the Hudson river within the jurisdiction of this State who upon catching any salmon shall not immediately return and restore the same to the water without injury.

The foregoing seem to be all of the acts and parts of acts that create misdemeanors in the game laws generally applicable to the State at large.

As there has been an attempt to generally revise the game laws at nearly every session of the Legislature, and it is understood such attempt is to be again made this session, and as provisions of the law are so apt to be amended and changed to meet local ideas and wishes, it has not seemed best to more than call attention to the general act, and to entirely ignore the many local acts affecting only the locality therein mentioned respectively.

HEALTH.

Revised Statutes, page 1191. Any person subject to quarantine who shall violate any of the regulations prescribed respecting the same, shall be guilty of a misdemeanor.

Revised Statutes, section 166, title 2, chapter 17, part 1. Any person who shall intermix with any hops any foreign or improper substance, or in any manner adulterate their quality, shall be guilty of a misdemeanor.

Laws 1869, Chap. 888, § 15. Any person who shall willfully dam up, obstruct, or in any way impair any ditch or channel or dam made for the draining of a swamp in pursuance of the provisions of section 15, chapter 888 of the Laws of 1869, shall be guilty of a misdemeanor.

Laws 1870, Chap. 331, § 2. Any person who shall knowingly and falsely claim or pretend to have or hold a certificate of license, diploma or degree, granted by any society, organized under and pursuant to the act for the incorporation of dental societies, and the act for the purpose of improving and regulating the practice of dentistry in this State, or who shall falsely and with intent to deceive the public, claim or pretend to be a graduate from any incorporated dental college, shall be guilty of a misdemeanor.

Laws 1878, Chap. 134. Any person transgressing the terms of any proclamation, order or regulation issued or prescribed by the governor under authority of the act in relation to infectious and contagious diseases of animals, shall be guilty of a misdemeanor.

Laws 1879, Chap. 540, § 2. Any person who shall practice dentistry for fee or reward in this State without having complied with the regulations of chapter 540, Laws 1879, shall be deemed guilty of a misdemeanor.

Laws 1880, Chap. 122, § 7. Any person violating the rules and regulations governing the transportation of dead bodies beyond the limits of the county where death occurred, for burial, is guilty of a misdemeanor.

— § 8. Any person maintaining, assisting to maintain, or in any manner aiding or abetting the maintenance of a public nuisance, declared to be such and ordered removed or abated by the governor of the State, after notice of such order, shall be guilty of a misdemeanor.

Laws 1881, Chap. 298, § 1. Any employer of females in any mercantile or manufacturing business, who shall neglect or refuse to provide suitable seats for such employees and to permit the use thereof to such an extent as may be reasonable for the preservation of their health, is guilty of a misdemeanor.

Laws 1881, Chap. 407. Any person who shall manufacture, brew, distill, have, offer for sale or sell any articles of food, drugs, spirituous, fermented or malt liquors, which are adulterated, within the meaning of the provisions of chapter 407 of the Laws

of 1881, and any person selling, offering, exposing for sale, or manufacturing, brewing or distilling any articles of food, spirituous, malt or fermented liquors, or delivering any such articles to purchasers, who shall refuse to serve or supply any public analyst or other agent of the State, or local board of health, who shall apply to him for that purpose and tender the value of the same, with a sample sufficient for the purpose of analysis, or who shall impede, obstruct, hide or prevent any analyst, inspector or prosecuting officer in the performance of his duty, under the provisions of chapter 407, Laws of 1881, as amended by chapter 176, Laws of 1885, shall be guilty of a misdemeanor.

Laws 1881, Chap. 407. Any person within this State who shall manufacture, have, offer for sale, or sell any article of food or drugs which is adulterated within the meaning of chapter 407, Laws of 1881, or otherwise violate the provisions of that act shall be deemed guilty of a misdemeanor.

Laws 1882, Chap. 292, § 2. Any violation of the act, chapter 292 of the Laws of 1882, in relation to regulating the standard of illuminating oils and fluids is a misdemeanor.

Laws 1883, Chap. 40, § 1. Any person who shall receive or board more than two infants under the age of three years in the same place at the same time, unless within two days after the reception of every such infant beyond the first two, a license shall be duly issued by the mayor or board of health of the city or town wherein such infant is so to be received or boarded, in accordance with law, shall be guilty of a misdemeanor.

Laws 1884, Chap. 361. All violations of the provisions of chapter 361, Laws of 1884, being an act to establish a State board of pharmacy, etc., shall be misdemeanors.

Laws 1885, Chap. 270, § 3, subd. 1. Any willful violation of any lawful instruction of a board of health of a city, village or town is a misdemeanor.

Laws 1885, Chap. 270, § 3, subd. 5. Any person neglecting or refusing to comply with the lawful requirements of any board of health in relation to registration of births, marriages and deaths, and any person permitting or assisting in the burial or removal of a dead body unaccompanied by a permit for said burial or removal, and any officer or board that shall neglect or refuse to register and preserve the records of such registration, and for-

ward the certificates to the State bureau of vital statistics, as by law required, shall be guilty of a misdemeanor. (As amended by chapter 309, Laws of 1888.)

Laws 1885, Chap. 270, § 4. Any person who shall willfully violate or refuse to obey any order or regulation made and published by the board of health of any city, village or town in this State, or any order legally made and served or posted, shall be guilty of a misdemeanor.

Laws 1885, Chap. 469. Any packer or dealer who shall violate any of the provisions of chapter 469 of the Laws of 1885, in relation to canned or preserved food, shall be guilty of a misdemeanor.

Laws 1885, Chap. 534, § 7. The master of any vessel arriving at any port of entry within this State, who shall refuse or neglect to comply with the provisions of sections 1, 2 and 3 of chapter 534, concerning public health, of the Laws of 1885, shall be guilty of a misdemeanor.

Laws 1885, Chap. 543. Any person who shall willfully fail or refuse to obey any rule or regulation made and published by the State board of health, and approved pursuant to the provisions of chapter 543 of the Laws of 1885, shall be guilty of a misdemeanor.

Laws 1886, Chap. 313, § 5. Any person who shall present to a county clerk, for the purpose of registration, any diploma or certificate which has been fraudulently obtained, or shall practice veterinary medicine and surgery without conforming to the requirements of chapter 313, Laws of 1886, or shall otherwise violate or neglect to comply with any of the requirements of said act, shall be deemed guilty of a misdemeanor.

Laws 1886, Chap. 467. The using of any substitute for hops, or pure extract of hops, in the manufacture of ale or beer, sold or offered for sale in the State, is a misdemeanor.

Laws 1886, Chap. 606. Any person willfully preventing or obstructing any inspector of vinegar appointed by the mayor of any city or the supervisor of any town, as provided by law, is guilty of a misdemeanor. (As amended by chapter 634, Laws of 1887.)

Laws 1887, Chap. 603, § 3. Any person or persons who shall sell or offer for sale, or manufacture with intent to sell, any wine of the kind and character described in section 3 of chapter 603 of

the Laws of 1877, which shall not be stamped, marked or labeled as provided in said section, shall be guilty of a misdemeanor.

Laws 1887, Chap. 636, § 2. Any person who shall refill more than once, prescriptions containing opium or morphine, or preparations of either, in which the dose of opium shall exceed one-fourth grain, or morphine one-twentieth grain, except with the verbal or written order of a physician, shall be deemed guilty of a misdemeanor.

Laws 1887, Chap. 647, § 2, subd. 3. Any indorsement of any medical diploma conferred by a medical school or college without the State, with fraudulent intent, or gross carelessness or ignorance, shall be deemed a misdemeanor.

Laws 1887, Chap. 647. Any person who shall willfully swear false to any statement contained in any affidavit made pursuant to the act regulating the licensing and registration of physicians and surgeons, etc., being chapter 647 of the Laws of 1887, and any person who falsely and without authority shall counterfeit, make or alter any diploma, certificate or instrument constituting a license to practice physic or surgery within this State, or any certificate or indorsement given in pursuance of this act, and any person who shall practice physic or surgery under a false or assumed name or falsely personate another practitioner of a like or different name, shall be deemed guilty of a felony.

Laws 1887, Chap. 647. Any person guilty of violating any of the other provisions of the act, or who shall buy, sell or fraudulently obtain any medical diploma, license, record or registration, or who shall aid or abet such buying, selling or fraudulently obtaining, or who shall practice physic or surgery in this State under cover of a diploma or license illegally obtained, or who after conviction of a felony shall attempt to practice physic or surgery in this State, or who shall assume the title of doctor of medicine or append the letters "M. D." to his or her name, without having received the degree of doctor of medicine from some school, college or board empowered by law to confer such title, shall be deemed guilty of a misdemeanor.

Laws 1887, Chap. 647, § 6. Any person who not being lawfully authorized to practice physic or surgery in this State, and so registered, shall practice physic or surgery within this State without a license and registration, shall be deemed guilty of a misdemeanor.

INDIANS.

Laws 1813, Chap. 29, § 1. Any person who, without the authority and consent of the legislature of the State, shall, in any manner or form or upon any terms whatsoever, purchase any lands within this State of any Indian residing therein, or make any contract with any Indian for or concerning any lands within this State, or shall in any manner give, sell, demise, convey or otherwise dispose of any such lands or any interest therein or offer so to do, or shall enter upon or take possession of or settle on any such lands by pretext or color of any right or interest in the same in consequence of any such purchase or contract, not with the authority and consent of the legislature of this State, he shall be guilty of a public offense, and on conviction forfeit and pay to the people of the State two hundred and fifty dollars, and be further punished by fine and imprisonment in the discretion of the court.

— § 11. Any person or persons other than Indians who shall settle or reside upon any lands belonging to any nation or tribe of Indians within this State, shall be deemed guilty of a misdemeanor.

Laws 1849, Chap. 420, § 1. Every person who shall sell or give to any Indian within this State any spirituous liquor or any intoxicating drink, shall be deemed guilty of a misdemeanor.

Laws 1857, Chap. 628, § 15, as amended by chapter 420, Laws of 1877. Any person who shall personally, or by his wife, servant, employee or other agent, sell or give away any strong or spirituous liquors, ale, beer or wine, to any Indian in this State, shall be deemed guilty of a misdemeanor.

Laws 1851, Chap. 659, § 1. Any person who shall offend against the rule or regulation made by the Onondaga tribe of Indians providing for the preservation of timber and stone on the land of their reservation, which regulation has been approved by the county judge of the county of Onondaga, shall be guilty of a misdemeanor. (Local.) (See also chapter 96, Laws of 1873.)

Laws 1873, Chap. 394, § 1. Any Indian being a member of the Tonawanda band of Seneca Indians who removes, or causes to be removed, or does or assists in removing from the Tonawanda reservation, any wood or trees, or timber, without the permit from a council of chiefs, as prescribed by section 2 of the act, and

any person not a member of said Tonawanda band of Seneca Indians who shall remove or aid or assist in removing from said reservation any wood or timber, or shall cut any growing wood or trees on said reservation with intent to convert the same to his own use, or to remove or to cause the same to be removed from said reservation shall be guilty of a misdemeanor.

Laws 1889, Chap. 554, § 2. If any member of the St. Regis tribe of Indians residing in the Dominion of Canada shall trespass or settle upon the reservation of the St. Regis tribe of Indians situated in the State of New York, he shall be guilty of a misdemeanor.

INSURANCE.

Laws 1880, Chap. 428. Any person violating any of the provisions of the act, chapter 428, Laws of 1880, regulating the admission to this State of fire and marine insurance companies from other countries than the United States, shall be guilty of a misdemeanor.

Laws 1881, Chap. 471, § 1. Any agent or shipper or other person who shall violate any of the provisions of section 1, chapter 471, Laws of 1881, being an act to regulate the charges of marine insurance companies upon the canals of this State, as amended by chapter 455 of the Laws of 1883, shall be guilty of a misdemeanor.

Laws 1883, Chap. 175, §§ 16, 20, 22. Violating the provisions of sections 16, 20 and 22 of chapter 175 of the Laws of 1883, as amended, being an act to provide for the incorporation and regulation of co-operative insurance associations and societies, is a misdemeanor.

Laws 1884, Chap. 346, § 4. Any agent, broker or person acting for himself or on behalf of any other person or persons in soliciting or procuring policies of insurance or risks on property within this State, or in any manner aiding the transaction of business for any insurance company or association that has neglected or refused to comply with the provisions of chapter 346 of the Laws of 1884, as amended by chapter 113 of the Laws of 1885, shall be guilty of a misdemeanor.

Laws 1886, Chap. 488. Any insurance company, its officers or agents, or either of them, making, issuing, delivering or offering to deliver any policy of fire insurance on property within this

State,*except as provided in chapter 488 of the Laws of 1886, shall be guilty of a misdemeanor.

Laws 1889, Chap. 282, § 5. Any person violating the provisions of chapter 282 of the Laws of 1889, relating to life insurance companies, etc., shall be guilty of a misdemeanor.

Laws 1889, Chap. 454. Any officer or agent of any corporation organized under chapter 454 of the Laws of 1889, relating to co-operative insurance companies, etc., whose duty it is to make any report or perform any act, who shall make in any report or statement any intentional, false or fraudulent statement, or who shall refuse to comply with any of the provisions of the act in respect to such report or statement, is guilty of a misdemeanor.

Laws 1889, Chap. 520. Any officer, member, agent, solicitor or examining physician of any fraternal beneficiary society, order or association, organized under chapter 520, Laws of 1889, or any other person, who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or with reference to any documentary or other proof for the purpose of obtaining membership in or benefit from any such society, order or association, for himself or any other person, shall be guilty of a misdemeanor.

MILITARY.

Laws 1862, Chap. 184, § 3, as amended by chapter 2, Laws of 1864. Whoever shall persuade or induce, or attempt to persuade or induce any resident of this State to enter the military or naval forces raised or to be raised in any other State, for the United States service or the service of any other State, or whoever shall induce or persuade or attempt to induce or persuade any resident of this State to depart from this State for the purpose of entering into the military or naval forces raised or to be raised in any other State for the United States service or the service of any other State, shall be deemed guilty of a misdemeanor.

Laws 1864, Chap. 391. Any agent or person who shall willfully defraud any person enlisting or having enlisted into the military or naval service of the United States, of the money to which such person is entitled as bounty or pay for such enlistment, shall be deemed guilty of felony.

Laws 1864, Chap. 391. Any person who shall knowingly and willfully use or administer to any person any drug or stupefying substance with intent, while such person is under the influence thereof, to induce him to enter the military service of the United States, or of this State, or of any State, shall be deemed guilty of a felony.

Laws 1878, Chap. 35, § 2. Any toll-gate or toll-bridge keeper or ferry-master or any other person or persons who may be in charge of any toll-gate, toll-bridge or ferry, who shall willfully hinder or delay any member or members of the National Guard in uniform, going to or returning from any parade, encampment or meeting, shall be deemed guilty of a misdemeanor.

MILITARY CODE.

§ 4. It shall be a misdemeanor for any county, city or town clerk to falsely mark "exempt" opposite the name of any person whom he knows not to be exempt from enrollment as a member of the National Guard, and any person making a false affidavit or procuring one to be made for the purpose of fraudulently securing exemptions from military service shall be guilty of perjury.

§ 54. Any person who shall secrete sell, dispose or offer for sale, purchase, or retain after proper demand made, or pawn or pledge any arms, uniforms or equipments, which shall have been issued under the provisions of the Military Code, and any person not a member of the National Guard who shall wear any uniform or designation of grade similar to those in use by the National Guard issued under the provisions of the Military Code, shall be deemed guilty of a misdemeanor.

§ 66. Any person who shall willfully injure any arsenal or armory, or its fixtures, or any uniforms, arms or equipments, or any other property therein deposited, or who shall introduce any wine, spirituous or malt liquors into any State arsenal or armory, shall be deemed guilty of a misdemeanor.

§ 67. Any officer who shall knowingly and willfully place, or cause to be placed, on the annual muster-roll the name of any person not lawfully enlisted, or if enlisted, who is dead, discharged, transferred, dropped or expelled, or has lost his membership from any cause, or is known to such officer to be permanently incapacitated for military duty, or to have been convicted of felony,

or has refused to do military duty for the six months immediately preceding, shall be guilty of a misdemeanor.

§ 75. It shall be a misdemeanor for any body of men whatsoever to violate the provisions of this section in reference to parade.

§ 88. Any person trespassing upon the ranges of the National Rifle Association or injuring any of the targets or other property situate thereon, or willfully violating thereon any of the regulations established to maintain order, preserve property and prevent accidents, shall be guilty of a misdemeanor.

Laws 1885, Chap. 8. Any person who shall willfully wear the badge of the Grand Army of the Republic, or who shall use or wear the same to obtain aid or assistance within this State, unless entitled so to do under the rules and regulations of the Department of New York, Grand Army of the Republic, shall be deemed guilty of a misdemeanor.

Laws 1887, Chap. 247, § 6. Any person who shall willfully remove, mutilate or destroy any battle flag, book, placard, record or relic deposited or kept in the bureau of records of the war of the rebellion, shall be deemed guilty of a misdemeanor.

OFFICERS.

Laws 1842, Chap. 130, § 19, art. 2, tit. 6. Any county clerk or deputy county clerk, or other officer on whom any duty is enjoined by the act, chapter 130 of the Laws of 1842, guilty of any willful neglect of such duty or corrupt conduct in the execution of the same, is guilty of a misdemeanor. (As amended by section 3, chapter 446, Laws of 1885.)

Laws 1849, Chap. 194, § 4, subd. 14. Any county officer or any officer whose salary is paid by the county, neglecting or refusing to make any report required by the board of supervisors of such county, is guilty of a misdemeanor.

Laws 1870, Chap. 291, § 11, tit. 3. Any trustee of any village who shall willfully neglect or omit to make, sign and present at the annual meeting of the electors of the village a statement as required by section 11, title 3, chapter 291, Laws of 1870, shall be guilty of a misdemeanor.

Laws 1870, Chap. 552, § 6. Any supervisor or other officer neglecting or refusing to perform any duty imposed by chapter

552 of the Laws of 1870, an act in relation to towns having a public debt, shall be deemed guilty of a misdemeanor.

Laws 1874, Chap. 143. Any officer or agent of any corporation organized under chapter 143 of the Laws of 1874, who shall refuse or neglect to exhibit the book required to be kept by such corporation containing the names of all persons, stockholders of such company, etc., who shall refuse or neglect to exhibit the same, or allow the same to be inspected and extracts to be taken therefrom by any persons entitled to do so under said law, shall be guilty of a misdemeanor.

Laws 1875, Chap. 482, § 8, as amended by chapter 97, Laws of 1881, and chapter 58, Laws of 1882, and chapter 63, Laws of 1886. Any supervisor who shall receive or vote for any allowance for his services, except such as are provided in section 8, chapter 482, Laws of 1875, as amended, shall be guilty of a misdemeanor.

Laws 1875, Chap. 611. Any inspector of election in any corporation formed under chapter 611, Laws of 1875, who shall violate his oath by receiving any vote which he believes to be illegal, or rejecting any vote which he believes to be legal, shall be deemed guilty of a misdemeanor.

Laws 1877, Chap. 401, § 4. Any surrogate of any county who appropriates to his own use, or in any way misappropriates or withholds moneys directed by the board of supervisors of such county to be paid for clerk hire, shall be guilty of a misdemeanor.

Laws 1880, Chap. 142. Any officer of the town or any member of the board of registry who shall willfully or corruptly neglect or refuse to perform any of the duties intrusted to or devolved upon him pursuant to chapter 142, Laws of 1880, and any person, who with intent to vote illegally at any meeting or election, shall cause his name to be entered or enrolled as entitled to the right of suffrage, being at the time a non-resident of the town or otherwise disqualified to vote, shall be deemed guilty of a misdemeanor.

Laws 1884, Chap. 312. All officials or other persons having power of appointment to or employment in the public service who fail to comply with the provisions of chapter 312, Laws of 1884, as amended by chapter 464, Laws of 1887, in reference to the employment of honorably discharged soldiers and sailors, shall be guilty of a misdemeanor.

Laws 1886, Chap. 316. Any willful misappropriation or embezzlement or a wrongful conversion of town bonds, or the moneys arising from the same, or to be raised by the sale thereof, in an amount exceeding \$1,000, as provided in chapter 316, Laws of 1886, shall be a felony.

Laws 1887, Chap. 713, § 14. Any appraiser appointed by virtue of chapter 713, Laws of 1887 (the collateral inheritance law), who shall take any fee or reward from any representative of any decedent or any person liable to pay a collateral inheritance tax, shall be guilty of a misdemeanor.

PUBLIC HIGHWAYS.

Laws 1880, Chap. 533, § 10. Whoever shall float or run any timber on rivers in this State recognized as public highways without giving bond required by section 10, chapter 533, Laws of 1880, is guilty of a misdemeanor.

Laws 1880, Chap. 541, § 1. Every person, association, company or corporation who shall violate the provisions of section 1, chapter 541, Laws of 1880, in reference to maintaining lights on swing bridges across the Hudson river, shall be guilty of a misdemeanor.

Laws 1886, Chap. 269. Any person permitting any carriage, vehicle or engine propelled by steam, to pass over, through or upon any public highway, road or street, unless the owner or agent or servant shall send a person of mature age at least one-eighth of a mile in advance to notify and warn passengers using such highway, road or street with horses or other domestic animals, of the approach of said carriage, vehicle or engine at night, such person going in advance to carry a red light, shall be guilty of a misdemeanor, except in incorporated villages.

PUBLIC INSTRUCTION.

Laws 1864, Chap. 555, § 12, tit. 2. Any person who shall procure or solicit any school commissioner of this State to act as agent for any author, publisher or bookseller, or directly or indirectly to recommend or procure the use of any book or school apparatus or furniture in any common school, or of any book for any district library, shall be guilty of a misdemeanor.

— **§ 31, tit. 3.** Any refusal by a supervisor of any town of this State to give the bond of security required by section 31 of title 3 of chapter 555, Laws of 1864, is a misdemeanor.

Laws 1864, Chap. 555, § 14, tit. 7. Any person who on being challenged at any neighborhood or school district meeting shall willfully make a false declaration of his right to vote at such meeting, shall be guilty of a misdemeanor.

— § 49, tit. 7, subd. 10, as amended by chapter 331, Laws of 1888. Any school trustee issuing any order or drawing any draft upon a supervisor for any money, unless there shall be at the time a sufficient amount of money in the hands of such supervisor belonging to the district to meet such order or draft, is guilty of a misdemeanor.

Laws 1878, Chap. 248, § 6. Any person who on having his vote challenged at an election for school district officers shall willfully make a false declaration of his right to vote at such election, shall be guilty of a misdemeanor.

RAILROADS.

Laws 1850, Chap. 140, § 9, as amended by chapter 133, Laws of 1880, and chapter 426, Laws of 1889. Any officer or director of any railroad company violating the provisions of law relating to increasing capital stock is guilty of a misdemeanor.

— § 28, subd. 10, as amended by chapter 724, Laws of 1881. Any officer or director of a railroad corporation who shall vote for, sign or certify to any bonds secured by mortgage or pledge of the corporate property, without the issue of such bond having received the legal sanction of the stockholders, as provided by law, is guilty of a misdemeanor.

Laws 1867, Chap. 483. Any person who shall advise or use any persuasion to induce any person being an officer, agent or employee of any railroad company or corporation in this State to leave the service of such company or corporation by reason of being required to wear a uniform or apparel to distinguish the position or rank of the wearer in the employ of the company, or to refuse to wear the same, or any part thereof; and any person who shall without authority wear such uniform or apparel; and any officer or agent of any such company who shall use any inducement with any person to come into the employment of any other company by reason of any uniform or apparel so required to be worn, shall be guilty of a misdemeanor.

Laws 1875, Chap. 606, § 31. Any person who while in charge of a locomotive engine on any railroad in this State, and any conductor of a car or train of cars on any such railroad, is intoxicated, is guilty of a misdemeanor.

Laws 1878, Chap. 261. Any person or persons who shall get off or on a freight car or engine while in motion, or who shall ride on any wood or freight car, unless employed by or with permission from the proper officers of such railroad, or the person in charge of such car or engine, shall be deemed guilty of a misdemeanor.

Laws 1880, Chap. 223, § 2. Any conductor or brakeman on any passenger train or any steam railroad in the State, appointed policeman by the governor according to law, who shall refuse or neglect to perform the duty imposed on him by such appointment, shall be liable to imprisonment.

Laws 1880, Chap. 510, § 2. A person violating any of the provisions of chapter 510, Laws of 1880, in reference to voting at a meeting of stock and bondholders of a railroad corporation, is guilty of a misdemeanor.

Laws 1881, Chap. 389, §§ 1, 2. Any agent, conductor, brakeman or employee of any elevated railroad, who shall start any train or car, or give any signal or order to any engineer or other person by signal rope or otherwise, to start any train or car, or who shall obstruct the ingress or egress of any passenger to and from any car, or who shall open or close a platform gate of any car, in violation of the provisions of sections 1 and 2 of chapter 389 of the Laws of 1881, shall be deemed guilty of a misdemeanor.

Laws 1882, Chap. 353, § 7. Every officer, agent or employee, of any railroad company who shall neglect or refuse to make or furnish any statement or report required by the board of railroad commissioners, or who shall willfully hinder, delay or obstruct the said commissioners in the discharge of their duties, shall be guilty of a misdemeanor. (Chapter 353, Laws of 1882, § 14, as amended by chapter 388, Laws of 1883.)

Any officer or director of any railroad corporation who shall sell or agree to sell, or be directly or indirectly interested in the sale or agreement to sell any shares of the stock of the corporation of which he is such officer or director, not being at the time the actual owner of such shares, shall be guilty of a misdemeanor.

Laws 1882, Chap. 353, § 14. Any commissioner, secretary, clerk, agent, employee or expert, who shall secretly reveal any information gained by him from one railroad company to any other railroad or company, or violations of the provisions of section 14, chapter 353, Laws 1882, as amended by chapter 388, Laws of 1883, by any members of the State railroad commission, shall be a misdemeanor.

Laws 1884, Chap. 252, § 8. Any person intentionally making a report as provided in section 8, chapter 252, Laws of 1884, in reference to street surface railroads. etc.. which shall be false, shall be guilty of perjury.

Laws 1884, Chap. 439, § 2. Whoever willfully destroys or breaks any bridge guard erected by a railroad company as a warning signal for a low bridge or structure which crosses the railroad above the tracks, shall be guilty of a misdemeanor.

Laws 1886, Chap. 151. Any officer or agent of any street surface or elevated railroad within the corporate limits of cities of this State having over 500,000 inhabitants, who shall exact from any of its employees more than twelve consecutive hours' labor in the twenty-four, with one-half hour for dinner, for a day, shall be guilty of a misdemeanor.

Laws 1887, Chap. 529. It shall be a misdemeanor for any officer or agent of any street surface and elevated railroad company whose main line of travel, or whose routes, lie principally within the corporate limits of cities of more than 100,000 inhabitants, to exact from any of such corporation's employees more than ten hours' labor, the same to be performed within twelve consecutive hours, with not less than one-half hour for dinner.

Laws 1887, Chap. 616. Any violation of the provisions of chapter 616 of the Laws of 1887 in relation to the heating of cars and the strengthening of bridges, is a misdemeanor.

Laws 1889, Chap. 524. Any person or corporation failing or neglecting to comply with the provisions of chapter 524 of the Laws of 1889 in relation to automatic car couplers, shall be guilty of a misdemeanor. (Takes effect November 1, 1892.)

SALT.

Laws 1859, Chap. 346, § 19, makes a willful neglect of duty or any malpractice in the discharge of the public duties by the

superintendent of the salt springs and the several persons holding office by his appointment a misdemeanor.

TAXES.

Laws 1855, Chap. 427, tit. 1, § 88. If any of the officers concerned in the execution of this act shall willfully neglect or refuse to perform the duties assigned him or them, such officers shall be deemed guilty of a misdemeanor.

Laws 1862, Chap. 285, § 2. It is a misdemeanor for the State comptroller, or any officer or clerk in his office, to be directly or indirectly interested personally in any tax sale made by said comptroller.

MISCELLANEOUS.

Laws 1870, Chap. 385. Any party or parties contracting with the State or any municipal corporation therein who shall exact or require more than eight hours of labor for the compensation agreed to be paid per day, shall be deemed guilty of a misdemeanor.

Laws 1871, Chap. 934. Any person taking an apprentice without complying with the provisions of chapter 934, Laws of 1871, shall be deemed guilty of a misdemeanor. Chapter 437, Laws of 1888, section 1.

Laws 1872, Chap. 590. Any person willfully violating any provision of chapter 590, Laws of 1872, entitled "An act to regulate processions and parades in the cities of the State of New York," shall be guilty of a misdemeanor.

Laws 1873, Chap. 19. Any person who shall intentionally, without malice, point or aim any firearms at or toward any other person, or who shall discharge without injury to any other person any firearms while intentionally without malice, aimed at or toward any person, or who shall injure any other person by the discharge of any firearms pointed or aimed intentionally, but without malice, at any such person, shall be deemed guilty of a misdemeanor.

Laws 1875, Chap. 175. Any person violating the provisions of chapter 175 of the Laws of 1875, regulating the sale of baled hay and straw in the State of New York, shall be deemed guilty of a misdemeanor.

Laws 1875, Chap. 181. A violation of any of the provisions of chapter 181 of the Laws of 1875, an act to authorize villages of the State of New York to furnish pure and wholesome water to

the inhabitants thereof by any water commissioner, shall be deemed a misdemeanor.

Laws 1877, Chap. 65, § 2. Any person who shall take, sell, or transfer any promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the right to make, use or vend any patent invention or inventions not having the words "given for a patent right" written or printed legibly and prominently on the face thereof, shall be deemed guilty of a misdemeanor, except that this shall not apply to a promissory note given solely for the purchase-price or the use of a patented article.

Laws 1878, Chap. 401. The violation of the provisions in relation to the use of stamps, labels or trade-marks, of chapter 401, Laws of 1878, is a misdemeanor.

Laws 1878, Chap. 404. Any violation of the provisions of chapter 404 of the Laws of 1878, an act to provide for the support, treatment and care of pauper, destitute and delinquent children, is a misdemeanor.

Laws 1880, Chap. 395. Any person violating the provisions of section 1 of chapter 395, Laws of 1880, in reference to receiving commissions from the captains or agents of any steam vessel employed in towing, except the towing of canal-boats, is guilty of a misdemeanor.

Laws 1881, Chap. 400. Any person who shall deny to any person full enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyances on land and water, theater, or other place of resort or amusement, because of race, creed or color, shall be guilty of a misdemeanor.

Laws 1881, Chap. 419, § 1. Any person who shall willfully pawn, pledge, sell or convert to his or her own use any material furnished to him or her for the purpose of being manufactured, shall be adjudged guilty of felony.

Laws 1883, Chap. 354, §§ 5, 12, 14. Any commissioner, examiner, copyist or messenger, or any other person who shall willfully or corruptly defraud another in relation to his rights of examination or standing in regard to the rules and regulations governing the administration of the civil service, or who shall violate

sections 10 and 11 of the civil service act, chapter 354, Laws of 1883, shall be guilty of a misdemeanor.

Laws 1883, Chap. 354, § 14. Any person holding, in nomination for, or seeking nomination for, any public office, violating the provisions of section 14 of chapter 354 of the Laws of 1883, is guilty of a felony.

Laws 1883, Chap. 356, § 3. Any person violating the provisions of section 3 of chapter 356 of the Laws of 1883, as amended by chapter 205 of the Laws of 1886, concerning reports to the bureau of labor statistics, shall be guilty of a misdemeanor.

Laws 1884, Chap. 474, §§ 5, 6. Any person neglecting to destroy or cause to be destroyed any hive and its contents marked by any commissioner as containing foul brood shall be deemed guilty of a misdemeanor.

Laws 1885, Chap. 283, §§ 21, 31 — (?) Provides punishment in reference to setting or refusing to comply with any order in reference to extinguishing forest fires.

Laws 1885, Chap. 314. Any person employing or directing another to do or perform any labor in the erection, repairing, altering or painting of any house, building, or other structure within this State, who shall knowingly or negligently furnish and erect, or cause to be furnished for erection, such unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances as will not give proper protection to the life and limb of any person engaged, shall be deemed guilty of a misdemeanor.

Laws 1885, Chap. 348. Every stenographer appointed as stenographer for a grand jury who shall violate any of the provisions of chapter 348, Laws of 1885, shall be deemed guilty of a misdemeanor.

Laws 1885, Chap. 490. Any tramp who shall enter any building against the will of the owner or occupant thereof, under such circumstances as shall not amount to burglary, or willfully or maliciously injure the person or property of another, which injury under existing law does not amount to a felony, or shall be found carrying any firearms or other dangerous weapon or burglar's tools or shall threaten to do any injury to any person or to the real or personal property of another, shall be deemed guilty of felony.

Laws 1886, Chap. 409. Any person who violates or omits to comply with any of the provisions of the act, chapter 409, Laws of 1886, as amended by chapter 462, Laws of 1887, and chapter 560, Laws of 1888, relating to factory inspectors, etc., shall be deemed guilty of a misdemeanor.

Laws 1887, Chap. 213. Willful and deliberate false swearing upon a hearing before a person designated by the governor to conduct a hearing in a matter pertaining to clemency shall be perjury.

Laws 1887, Chap. 323. Any person offending against the provisions of the act, chapter 323, Laws of 1887, concerning labeling and marking of prison-made goods, shall be guilty of a misdemeanor.

Laws 1887, Chap. 377, § 2. Violations of provisions of section 2, chapter 377, Laws of 1887, as amended by chapter 181, Laws of 1888, in relation to bottlers, etc., is a misdemeanor.

Laws 1887, Chap. 403. If any owner of any fruit tree infected with the contagious disease known as the yellows, neglects to remove or destroy, or cause to be removed or destroyed, such diseased tree or fruit, after the examination and notification provided for in chapter 403 of the Laws of 1887, he shall be deemed guilty of a misdemeanor.

Laws 1887, Chap. 479. Any person who shall engage in pool selling at any time or place, except as provided in chapter 479, Laws of 1887, shall be guilty of a felony.

Laws of 1887, Chap. 532. Any person who violates the provisions of chapter 532 of the Laws of 1887, relating to the moral protection of messenger boys, shall be guilty of a misdemeanor.

Laws 1887, Chap. 533. Any person trespassing upon or taking any ice lying between the center of any stream of this State and the banks of any owner or occupant, who shall have posted in a conspicuous manner upon said lands near the banks of said waters a written or printed notice of his desire to cut ice in front of said lands, or who willfully removes any such notice, shall be guilty of a misdemeanor.

Laws 1887, Chap. 720. Any person or persons violating any of the provisions of the act, chapter 720, Laws of 1887, concerning the providing of fire-escapes in hotels, shall be guilty of a misdemeanor.

Laws 1888, Chap. 1. Any person who shall willfully wear the insignia or rosette of the military order of the Loyal Legion of the United States, or use the same to obtain aid or assistance within this State, unless entitled to do so under the constitution, by-laws, rules and regulations of the said legion, shall be guilty of a misdemeanor.

Laws 1888, Chap. 539. If the quantity of coal in any load or part of load of coal purchased by or intended to be delivered to any consumer is less than the amount mentioned in the certificate over the signature of a licensed weigher, the weigher, upon conviction, shall be guilty of a misdemeanor.

Laws 1889, Chap. 283. Whoever shall neglect to report to the commissioner in lunacy, as required by section 20, chapter 283, Laws of 1889, shall be guilty of a misdemeanor.

Laws 1889, Chap. 382, §§ 64, 94. Any person violating the provisions of sections 64 or 94 of chapter 382 of the Laws of 1889, relating to State prisons, etc., shall be guilty of a misdemeanor.

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